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SELECT AMERICAN CASES

ON THE

LAW OF SELF-DEFENCE

BY

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AND

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SOULE, THOMAS & WENTWORTH

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PREFACE.

THE title of this volume and the analysis on the following page will sufficiently suggest its contents. Although it is entitled American Cases, a few modern English cases have been given, either in the text or in the notes. This is not a collection of *leading* cases in any sense of that term. We have, on the contrary, endeavored to collect *'all* the American cases of any considerable importance, bearing upon the comprehensive subject of *Self-Defence*. This plan we have carried out at the expense of swelling the book to a thousand pages. We may have made a mistake in doing so; but we have gone upon the conviction that the lawyers want the cases themselves, and not our conclusions as to the result of the cases. We have, therefore, at the expense of impairing the artistic appearance of this volume, drawn into the notes many cases at full length, or fully abstracted them so far as they relate to the subject under discussion. It is thought, however, that the notes will not be found lacking in independent discussions and brief summaries, showing the results of the adjudications. The cases which relate to those questions growing out of the law of self-defence which are still in a state of uncertainty or dispute—such as “retreating to the wall,” threats, and character for violence of the prosecutor or person slain—have been

given as principal cases, or drawn into the notes without any attempt at abbreviation. In these instances we have, for the most part, preferred to allow the judges and counsel to conduct the discussion rather than attempt it ourselves. With reference to the questions of evidence indicated by the title of PART IV, our limit as to space has prevented us from doing more than to give four recent cases, two of which, it is believed, have a tendency greatly to modify previously existing notions upon the questions which they discuss.

Some attempt has been made to reduce the cases to a consistent arrangement, but this has been only partially successful. The difficulty of doing so will be obvious, when it is considered that many of the cases treat upon several different branches of the law of self-defence, and hence that in placing such a case under one head it is necessarily omitted under another. The inconvenience resulting from this difficulty has been overcome by a system of cross references in the head-notes of the principal cases, so that wherever the searcher finds a point of doctrine stated, he is referred to every other case in the book where the same point is under discussion.

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SELECT AMERICAN CASES

ON THE

LAW OF SELF-DEFENCE.

PART I

DEFENCE OF THE PERSON.

A.—AGAINST ASSAULTS AND DEMONSTRATIONS THREATENING DEATH OR GREAT BODILY HARM.

COMMONWEALTH v. SELFRIDGE.

Supreme Judicial Court of Massachusetts, Boston, 1806.

DEFENCE AGAINST FELONIOUS ASSAULT—DANGER MUST BE ACTUAL AND IMMINENT TO JUSTIFY KILLING—REASONABLE FEAR EXCUSES—MANSLAUGHTER DEFINED—DISTINCTION BETWEEN EXCUSABLE AND JUSTIFIABLE HOMICIDE—DEFENCE AGAINST FELONIOUS ASSAULT—ASSAILED MUST ENDEAVOR TO RETREAT BEFORE KILLING, UNLESS, ETC.—REASONABLE FEAR OF DEATH OR OTHER FELONY EXCUSES HOMICIDE—REASONABLENESS OF FEAR, A QUESTION FOR JURY—KILLING IN RESISTANCE OF NON-FELONIOUS ASSAULT NOT EXCUSABLE—NOR WHERE SLAYER BRINGS UPON HIMSELF THE NECESSITY—BUT A LIBELLOUS PUBLICATION DOES NOT TAKE AWAY RIGHT OF DEFENCE.

Per PARSONS, Chief Justice, charging the Grand Jury :

1. A man may repel force by force in the defence of his person, against any one who manifestly intends or endeavors, by violence or surprise, feloniously to kill him. And he is not obliged to retreat, but he may pursue his adversary, until he has secured himself from all danger ; and if he kill him in so doing, it is *justifiable self-defence*.

2. But a bare fear, however well grounded, unaccompanied by any overt act, indicative of such intention, will not warrant him in killing. There must be an actual danger at the time; and it must plainly appear by the circumstances of the case, as the manner of the assault, the weapon, etc., that his life was in imminent danger; otherwise the killing of the assailant will not be *justifiable homicide*.

3. But if the party killing had reasonable grounds for believing that the person slain had a felonious design against him, although it should afterwards appear that there was no such design, it will not be murder; but will be either manslaughter or *excusable homicide*, according to the degree of caution used, and the probable grounds of such belief.

Per PARKER, J., charging the Traverse Jury:

4. *Manslaughter* consists in the unlawful and wilful killing of a reasonable being without malice, express or implied, and without any justification or excuse.

5. When the killing is the result of particular malice or general depravity, it is murder; when without malice, but caused by sudden passion and heat of blood, it is manslaughter; when in defence of life, it is *excusable*; and when in advancement of public justice, in obedience to the laws, it is *justifiable*.

6. If a man, while in the lawful pursuit of his business, is attacked by another, under circumstances which indicate an intention to take away his life, or do him some enormous bodily harm, he may lawfully kill the assailant, provided he use all the means in his power, otherwise to save his own life, or prevent the intended harm—such as retreating as far as he can, or disabling his adversary without killing him, if it be in his power. [Acc. John Doe's case, *post*; Drum's case, *post*; Sullivan's case, *post*; Benham's case, *post*; Shippey's case, *post*. Contra, Isaac's case, *post*. At least, not if the assault be with a deadly weapon. Thompson's case, *post*; John Kennedy's case, *post*. Nor where a forcible felony is attempted against person or property. Pond's case, *post*; Carroll's case, *post*. Nor where one is assaulted in his habitation. Pond's case, *post*. See note to Isaac's case, *post*; and note to Bohannon's case, *post*.]

7. When the attack upon him is so sudden, fierce and violent, that a retreat would not diminish but increase his danger, he may instantly kill his adversary, without retreating at all.

8. When, from the nature of the attack, there is reasonable ground to believe that there is a design to destroy his life, or commit any felony upon his person, the killing of the assailant will be excusable homicide, although it should afterwards appear that no felony was intended.

9. Whether the appearances were sufficient to convince a reasonable man that death or a felony upon the person was intended, is a question for the jury. [Acc. Wiltberger's case, *post*; Harris' case, *post*; McLeod's case, *post*; and many others.]

10. Where the defence was that the assault was so violent and fierce that defendant could not retreat, the jury were instructed that it was important for them to ascertain whether a violent blow which the deceased inflicted on the forehead of the defendant with a cane, was given before or after the fatal shot was fired.
11. Where the defendant was suddenly assaulted on the street with a cane, and thereupon shot and killed his assailant, the jury were instructed to settle in their minds, from all the circumstances of the case—the suddenness and violence of the attack—the nature of the weapon with which it was made—the place where the catastrophe happened—the muscular debility or vigor of the defendant and his power to resist or fly—whether the defendant could not have saved himself from death or great bodily harm, by retreating to the wall, or throwing himself into the arms of friends who would protect him. This was the real stress of the case; and if the defendant could have escaped his adversary's vengeance at the time of the attack, the defence of excusable homicide in self-defence had failed.
12. There is no principle of law which will excuse the killing of an assailant simply to resist a chastisement, not apparently threatening great bodily harm, but only intended to disgrace the defendant in the eyes of his fellow men.
13. When an assault is brought upon a person by his own procurement, and in resisting the same he kills the assailant, he cannot avail himself of the plea of self-defence. [Acc. Neeley's case, *post*; Adam's case, *post*; Stewart's case, *post*; Rippy's case, *post*; Evan's case, *post*; and others.]
14. But as mere words will not justify an assault, it follows that where the defendant published a libel against the father of the person slain, which led the deceased to attack him upon the street, during which attack the defendant shot and killed the deceased, this was not such a procurement of the difficulty, nor did it place the defendant so much in fault, as to deprive him of the right to urge the plea of self-defence.

The Court was opened on the 25th day of November, 1806. Present, the Hon. THEOPHILUS PARSONS, LL. D., *Chief Justice*; the Hon. THEODORE SEDGWICK, LL. D., the Hon. SAMUEL SEWELL, and the Hon. ISAAC PARKER, *Justices*.

The Grand Jury being impannelled and sworn, the Chief Justice delivered a learned and impressive charge, from which the following is extracted, as applicable to the law of self-defence: "A man may repel force by force in defence of his person, against any one who manifestly intends or endeavors by violence or surprise, feloniously

to kill him. And he is not obliged to retreat, but he **may** pursue his adversary until he has secured himself from all danger; and if he kill him in so doing, it is *justifiable self-defence*. But a bare fear, however well grounded, unaccompanied by any overt act, indicative of such intention, will not warrant him in killing. There must be an actual danger at the time. And, (in the language of Chief Justice Hale,) it must plainly appear by the circumstances of the case, as the manner of the assault, the weapon, etc., that his life was in imminent danger; otherwise the killing of the assailant will not be *justifiable homicide*. But if the party killing had reasonable grounds for believing that the person slain had a felonious design against him; although it should afterwards appear that there was no such design, it will not be murder; but will be either manslaughter or excusable homicide, according to the degree of caution used, and the probable grounds of such belief. These principles have been recognized by the wisest and most humane writers on criminal law."

The Grand Jury returned an indictment against Selfridge for *manslaughter* in the killing of Charles Austin. The trial of the prisoner was then postponed at his own request, and he was admitted to bail in the sum of *two thousand dollars* by himself, and two thousand by sureties, without opposition from the Government.

On the 23d day of December, 1806, the trial commenced before Mr. Justice PARKER.

James Sullivan, Attorney General, and *Daniel Davis*, Solicitor General, for the Commonwealth; *Christopher Gore* and *Samuel Dexter* for the defendant.

The facts of the case were these: Mr. Selfridge was a member of the Suffolk bar, well advanced, and of good standing in his profession. The deceased, Charles Austin, was a student of Harvard University, about eighteen years of age. He was the son of Benjamin Austin, a political writer and an active politician in the Dem-

ocratic ranks. Mr. Selfridge was a Federalist. A quarrel had arisen between Mr. Selfridge and Mr. Benjamin Austin, the facts of which were these: One Eben Eager had been employed by a committee, of which Benjamin Austin was chairman, to provide a dinner on Copp's Hill for a Democratic celebration on the Fourth of July. There being some difficulty in the settlement of the bill, Mr. Selfridge, at the request of Mr. Eager, commenced suit. The matter was subsequently settled; but Mr. Selfridge understanding that Mr. Austin had made some reflections on his professional character, sent him the following note:

"BOSTON, 29th July, 1806.

"MR. BENJAMIN AUSTIN,

"SIR:—My friend, Mr. Welch, will deliver you this note, and receive any communication you may see fit to make.

"You have to various persons, and at various times and places, alleged 'that I sought Mr. Eager, and solicited him to institute a suit against the committee (of which you were chairman), who provided the public dinner on Copp's Hill on the Fourth of July' or language of similar import. As the allegation is utterly false, and, if believed, highly derogatory to any gentleman in his professional pursuits, who conducts with fidelity to his clients, integrity to the courts, and with honor to the bar; you will have the goodness to do me the justice forthwith to enter your protest against the falsehood, and furnish me with the means of giving the same degree of publicity to its retraction, that you have probably given to its propagation. I had hoped the mention of this subject to you yesterday would have spared me the trouble of this demand;—that twenty-four hours would have enabled you without difficulty to have obtained correct information as to the fact; and that a just sense of propriety would have led you to make voluntary reparation where you had been the instrument of injustice. The contrary, however, impresses me with the idea that you

intended a wanton injury from the beginning, which I never will receive from any man with impunity.

“I am, Sir, your humble servant,
[Signed.] THOS. O. SELFRIDGE.”

Mr. Austin, on receiving this letter, observed to Mr. Welch, the bearer of it, that he could say nothing further than he had said to Mr. Selfridge yesterday. The next morning Mr. Austin met Mr. Welch, and observed that he had made inquiry concerning the truth of the report, and was convinced of its falsity; that he had been to those persons to whom he had mentioned it, for the purpose of removing the unfavorable impression which the report, if true, would make. He observed that it was not true that he had used Mr. Selfridge's name. Mr. Welch stated the result of this interview to Mr. Selfridge, who replied that his name had been used, and that that which Mr. Austin stated was not true. The same day, Mr. Welch again saw Mr. Austin, and told him that Mr. Selfridge was not satisfied with the result of the conversation of the morning, but conceived that he had a right to demand of him the means of counteracting a falsehood. Mr. Austin replied that he entertained a different opinion, and did not think anything more could reasonably be expected of him.

The same day Mr. Selfridge penned another note, which was delivered on the 1st of August following:

“July 30, 1806.”

“MR. B. AUSTIN,

“SIR: The declarations you have made to Mr. Welch are jesuitically false, and your concession wholly unsatisfactory. You acknowledge to have spread a base falsehood against my professional reputation. Two alternatives, therefore, present themselves to you: either give me the author's name, or assume it yourself. You call the author a gentleman, and probably a friend. He is in grain a liar and a scoundrel. If you assume the falsehood yourself to screen your friend, you must acknowledge it under your own hand and give me the means of vindicating myself against the effect of your aspersion.

"A man who has been guilty of so gross a violation of truth and honor, as to fabricate the story you have propagated, I will not trust; he must give me some better pledge than his word for present indemnity and future security. The positions I have taken are too obviously just to admit of any illustration, and there is no ingenuous mind would revolt from a compliance with my requisitions.

"I am, Sir, your humble servant,

[Signed.]

THOS. O. SELFRIDGE."

Mr. Austin, on receiving this note, declined to make any further amends than he had already made.

Mr. Selfridge then published the following note in the Boston Gazette of August 4th:

"AUSTIN POSTED."

"Benjamin Austin, loan officer, having acknowledged that he has circulated an infamous falsehood concerning my professional conduct in a certain cause, and having refused to give the satisfaction due to a gentleman in similar cases, I hereby publish said Austin as a coward, a liar and a scoundrel; and if the said Austin has the effrontery to deny any part of the charge, he shall be silenced by the most irrefragable proof.

"THOS. O. SELFRIDGE.

"BOSTON, 4th August.

"P. S. The various editors in the United States are requested to insert the above notice in their journals, and their bills shall be paid to their respective agents in this town."

Mr. Austin obtained knowledge that he was posted, and published in the Independent Chronicle of the same morning, the following note:

"Considering it derogatory to enter into a newspaper controversy with one T. O. Selfridge, in reply to his insolent and false publication in the Gazette of this day; if

any gentleman is desirous to know the facts, on which his impertinence is founded, any information will be given by me on the subject. BENJAMIN AUSTIN.

"Those who publish Selfridge's statement, are requested to insert the above, and they shall be paid on presenting their bills."

On the morning that these advertisements appeared there was a great deal of excitement in the city, and a general expectation that there would be a personal collision between the parties. Mr. Selfridge himself was informed by a friend on that morning, that he would be attacked by some one, and he gave the witness to understand that he had been previously notified, or was ready; and when another friend asked him how he and Austin came on, he smiled, and said he understood Austin had hired or procured some one, or some bully, (the witness did not recollect which expression was used) to attack him. This was a few moments before the encounter took place.

At about one o'clock in the afternoon, Mr. Selfridge left his office, on the north side of the old State House, and proceeded leisurely down State street towards Suffolk Buildings, on the corner of Congress street. When he had arrived about opposite to what was then called Half Court Square, now Congress Square, and was nearly in the middle of the street, Mr. Charles Austin, who was standing on the sidewalk before Townsend's shop, between Congress street and Half Court Square, advanced towards him with a walking stick in his hand, with which he gave Mr. Selfridge several blows upon the head. As the first or second blow was descending, the latter fired a pistol, and Mr. Austin expired in a few moments, although he struck several blows after he was shot. The ball entered the body a little below the left pap; its course was oblique and diagonal with the trunk of the body, inclining upward towards the left side; it passed through the lungs, but not the heart, for it lodged above it.

There was some discrepancy between the witnesses at the trial, as to whether a blow was struck before the pistol was fired. John M. Lane testified that he was standing at the door of his shop on the north side of State street, between Wilson's lane and Exchange lane, (now Exchange street), looking across the street, and there saw the defendant standing on the brick pavement. His face was towards the witness; young Mr. Austin was standing in front of the defendant. The defendant stood with his arms folded, or rather crossed horizontally, the right arm being uppermost, and in that position, he fired the pistol. The deceased turned round instantly, and gave the defendant several strokes before he fell. Edward Howe testified, that in passing from Townsend's shop to the east end of the old State House, he met Mr. Selfridge about two rods from Townsend's shop. He had on a frock coat, and his hands were behind him. After passing on six or eight steps, the witness heard a loud talking behind him. He immediately turned, and the first thing he saw was Mr. Selfridge's hand with a pistol in it; the pistol was immediately discharged. The instant *afterwards*, he saw the person shot at, *step from the sidewalk* and strike Mr. Selfridge several very heavy blows on the head. Ichabod Frost testified, that he was standing opposite Mr. Townsend's shop, and hearing the report of a pistol, turned his eyes and saw a smoke; at that instant the deceased was *stepping from the sidewalk* with his stick up.

These were witnesses called by the Government. The witnesses called by the defendant, gave a different statement. John Bailey was at work in Mr. Townsend's shop. He saw Charles Austin pass down the street, and afterwards saw him pass up; he returned and took his stand directly in front of the shop. He had a stick in his hand of an unusual size. Witness soon afterwards saw the defendant passing down the street; he had his right hand in his pocket, his left hanging down. When Mr. Selfridge first came in sight, the deceased was standing on the side pavement, in front of the shop, in con-

versation with Fales, a college friend, and playing with his cane. The moment the defendant caught his eye, he left Fales, and stepped off the brick pavement into the street. He moved with a quick pace, and, while going, shifted his cane from his left to his right hand. After he had got off the pavement, he turned and went towards the defendant with his cane raised up. They met about seventeen paces from the place the deceased had left. The deceased held the cane by the upper or largest end. The cane was uplifted, and actually descending to give a blow at the time the pistol was discharged. The blow was not struck until after the pistol was fired. Zadock French was near Townsend's shop. He saw Mr. Selfridge going from the northeast corner of the old State House towards the branch bank, (situated between Congress and Kilby streets, a little beyond Suffolk Buildings). He walked very deliberately, with his hands behind him, or under his coat. When opposite the witness, he was a little south of the middle of the street. All at once he turned or wheeled towards the witness. At the same instant, Charles Austin stepped off the brick pavement and walked with a very quick step towards him, having his cane raised. Mr. Selfridge, as he turned towards the witness, presented a pistol as if to defend himself. It appeared to the witness that Austin's breast went against the muzzle of the pistol. Austin struck the defendant a blow on the head, and the pistol was fired *at the same instant*. Richard Edwards was standing with Mr. French. He saw Mr. Selfridge passing slowly in the direction of the branch bank. Immediately young Austin passed from behind witness towards the middle of the street. By the time witness had turned, young Austin had got nearly to the middle of the street, and he saw Mr. Selfridge immediately before him, with his arm extended and a pistol in his hand. Young Austin had a cane in his hand, and at the instant the pistol was discharged, witness saw the cane elevated, but he was not able to say whether it was descending to strike a blow or recovering from striking one. After the

pistol was discharged, the deceased struck several blows with the cane. John Erving saw young Austin with his cane raised, moving at a quick pace towards Mr. Selfridge, who had his left arm lifted as if to parry a blow. He took a pistol from his right hand pocket, and fired under his arm. The first blow and the firing of the pistol seemed to be at the same instant. Lewis Glover testified, that when the deceased came up to Mr. Selfridge, he struck him on his hat; while he was aiming the *second* blow, Mr. Selfridge took his hands from behind him, presented a pistol and fired it. The witness said he stood within fifteen feet of the parties, and kept his eye steadily upon them. He was confident there was one blow before the pistol was discharged, and that it was a violent one, sufficient, he should believe, to knock a man down who had no hat on. Joseph Wiggin saw Mr. Selfridge coming down the street, and turned to see if Austin had moved from his place, and found he had. At that moment the witness heard a sound, as of the stroke of a stick upon a coat. Casting his eye around, he then saw Mr. Selfridge present his pistol, step back one step, and fire.

It appeared that young Austin was about eighteen years old, and very much superior to Mr. Selfridge in physical strength. He usually carried a rattan, but on the morning of his death, he purchased a heavy hickory cane; asked if it was a strong one and "would stand a good lick." A witness who sold him the cane, said he had sold him canes for six months, about once a week, and he had always purchased small bamboos. Mr. Austin, senior, testified, however, that his son had a cane at home, twice as large as the one he struck Mr. Selfridge with, although he usually carried a small one.

It was in evidence that Mr. Selfridge was of a very slender and delicate constitution, which his appearance indicated, and he had been noted for it when at college, never having been able to engage in the athletic sports and exercises peculiar to collegians. It was also testified that Mr. Austin, senior, said a short time before the

affray and on the same day, that he "should not meddle with Selfridge himself, but some person upon a footing should take him in hand;" and that one of Mr. Selfridge's friends informed him that he was to be attacked by a bully, hired for that purpose. Mr. Austin, however, denied on oath explicitly, that he ever had any intention of inflicting personal injury upon Mr. Selfridge, or of hiring any one to do it. "I appeal to God," said he, when questioned upon this point, "he would have passed me as safely as he stands at your bar." The evidence of Lemuel Shaw, afterwards Chief Justice of Massachusetts, who occupied the same office with Mr. Selfridge, was offered to show that Mr. Selfridge went on 'Change that day upon business. It appeared that Mr. Selfridge received a dangerous wound from young Austin at the time of the affray. Dr. Warren was called to him in the evening, and found a large contusion on his forehead about the middle of it. It was three inches in length and one in breadth. The blow must have been given, the witness thought, when the hat was on. The hat was produced in court, and found very much bruised.

For the defendant, it was urged that the killing was in self-defence; that he was in such imminent danger of suffering death or enormous bodily harm, that he had no reasonable prospect of escaping but by killing his assailant. The counsel for the defendant, in commenting on the evidence, contended, that Mr. Selfridge went on the Exchange about his lawful business, and without any design of engaging in an affray; that he was in the practice of carrying pistols, and that it was uncertain whether he took the weapon in his pocket in consequence of expecting an attack; that if he did, he had a right to do so, provided he made no unlawful use of it; that the attack was so violent and with so dangerous a weapon that he was in imminent danger; that it was so sudden, and himself so feeble that retreat would have been attended with extreme hazard; that the pistol was not discharged until it was certain that no one would inter-

fere for his relief; and that blows, which perhaps might kill him, and probably would fracture his skull, were inevitable in any other way, and that the previous quarrel with the father of the deceased, if it could be considered as affecting the cause, arose from the misbehavior of old Mr. Austin, and that the defendant had been greatly injured in that affair.

PARKER, J., charged the jury as follows:

“GENTLEMEN OF THE JURY: As this most interesting trial has already occupied four days, and as you must be by this time nearly exhausted, I shall endeavor, in discharging the duty incumbent on me, to consume as little more of your time as may be consistent with a clear exposition of the principles necessary to be understood in order to form a just and legal decision. You have heard the important facts in the case, minutely and distinctly stated by the witnesses, ably and ingeniously commented upon by counsel, and the principles of law elaborately discussed and illustrated in as forcible and eloquent arguments as were ever witnessed in any court of justice in our country. It is now left to you upon the whole view of the case, both of the law as it shall be declared to you by the court, and the facts as proved by the testimony, to pronounce a verdict between the defendant and your country.

“That in so important a trial it should have devolved upon me alone to preside over its forms, as well as to declare the principles upon which your decision is to rest, is by no means a subject of congratulation. It is a situation which of all others I should have avoided, had not official duty imperiously imposed it upon me. But the organization of the court, and distribution of the services of its members are such as to have rendered any other arrangement difficult, if not impossible. Under our present judiciary establishment, all criminal causes, other than capital, are triable before one judge; and this system has proved itself to be eminently calculated for the dispatch of public business. Other provisions in the system insure as great a degree of correctness as can be

expected of any human institution. It is true that although at a term holden by one judge, if others are present, they may proceed together; but at this time, the court being in session in three, if not four, counties, it was impracticable, had it been desirable, to have more than two judges engaged in the present trial. The great delay which would have taken place in consequence of a division of opinion (a case not unlikely to happen in the course of any trial) between two judges, rendered it altogether inexpedient that more than one should attend; and as this term had been previously assigned to me, the unpleasant task of officiating in the present case seemed unavoidably to belong to me.

“Since it has thus fallen to me to execute a painful and anxious duty, I shall not shrink from the task of declaring to you the principles of law by which you are to be governed in your investigation and decision of this case. If in doing this, I should be found capable, in order to retain the favor of one class of the community, or to court that of another, of abusing my office by stating that to be the law which I know to be otherwise, this is the last time I should be suffered to sit upon this bench, and I ought to meet the execration and contempt of the society to which I belong.

“The crime charged by the Grand Jury upon the defendant is manslaughter; a crime of high consideration in the eye of the law. This crime, however, is not defined by our statute, but its punishment is by it provided for. In order, therefore, to ascertain the nature and character of the crime, it is necessary to resort to the books of the common law, the principles of which, by the constitution of our government, are made the law of our land, until they shall be changed or repealed by our own legislature. The counsel for the government, as well as for the defendant, have therefore wisely and properly searched the most approved authorities of the common law, for the principles upon which the prosecution or the defence, must be supported. It is from these books alone that any clear ideas of the offence which is

in trial, or the defence which has been set up, can be attained.

“The crime of manslaughter, according to those authorities, consists of the unlawful and wilful killing of a reasonable being, without malice, express or implied, and without any justification or excuse. That the killing of a human being under some circumstances is not only excusable, but justifiable, is proved by the very terms of this definition. Some persons, however, have affected to entertain the visionary notion that it is in no instance lawful to destroy the life of another, grounding their opinion upon the general proposition of the Mosaic code, that “whosoever sheddeth man’s blood, by man shall his blood be shed.” There is always danger in taking general propositions, as the rules of faith or action, without attending to those exceptions which, if not expressly declared, necessarily grow out of the subject matter of the propositions. Were the position above alluded to, true in the extent contended for by some, then the judge who sits in the trial of a capital offence, the jury who may convict, the magistrate who shall order execution, and the sheriff who shall execute, will all fall within the general denunciation, as by their instrumentality, the blood of man has been shed. The same observations may be applied to one of the precepts of the decalogue. ‘Thou shalt not kill’ is the mandate of God himself. Should this be construed literally and strictly, then a man who, attacked by a robber, or in defence of the chastity of his wife, or of his habitation from the midnight invader, should kill the assailant, would offend against the divine command, and be obnoxious to punishment. But the common understanding of mankind will readily perceive, that the very nature of man, and principle of self-preservation, will supply exceptions to these general denunciations.

“Our laws, like those of all other civilized countries, abundantly negative such unqualified definitions of crime, and have adopted certain principles by which the same act may be ascertained to be more or less criminal

or entirely innocent, according to the motive and intent of the party committing it. Thus, when the killing is the effect of particular malice or general depravity, it is murder, and punished with death. When without malice, but caused by sudden passion and heat of blood, it is manslaughter. When in defence of life, it is excusable. When in advancement of public justice, in obedience to the laws of the government, it is justifiable. These principles are all sanctioned by law and morality, and yet they all contradict the dogma, 'Whosoever sheddeth man's blood, by man shall his blood be shed.' It is not necessary for you to run a nice distinction between justifiable and excusable homicide. If the one now in trial be either the one or the other, it is sufficient for the purpose of the defendant. A distinction existed in England which does not exist here. There, the man who had committed an excusable homicide forfeited his goods and chattels, while he who had a justification, forfeited nothing. Here, whether the homicide be justifiable or excusable, there must be an entire acquittal.*

*See also Pond's case, *post*, where the distinction between excusable and justifiable homicide is stated.

For the reason stated by the learned judge in the principal case, it has literally dwindled into a distinction without a difference, in the United States. And it is a distinction too nice and refined for the comprehension of average juries. Indeed, we frequently find confusion on the part of judges and text writers in regard to it. Thus, take Pond's case, *post*, where Campbell, J., in quoting from the common law text writers, to show under what circumstances homicide is *excusable*, runs into a paragraph from Russell, where it is stated that if the party assaulted does all he can to get out of the way, and then kills his assailant, in order to save his own life, etc., he will be *justified*. Indeed, in the principal case, the two kinds of homicide are confused, the Chief Justice pronouncing homicide in self-defence *justifiable*, while Mr. Justice Parker pronounces it *excusable*.

In Georgia, it is declared by statute that there being no rational distinction between excusable and justifiable homicide, it shall no longer exist. Cobb's Digest, p. 784, § 12. And in several of the other States and Territories, the distinction between the two kinds of homicide is declared by statute; that is to say, all kinds of homicide in self-defence, or in resistance of felony, or in advancement of public justice, is *justifiable*; while it is homicide by misadventure that is *excusable*. Statutes of Ark., 1858, p. 331, § 20 *et seq.*; Comp. Laws Cal., 1853, p. 641, §§ 29-34; Rev. Stat. Col., 1868, p. 199, §§ 28-33; Gross' Ill. Stat., 1869, p. 172, §§ 13-18; Laws of Dakota, 1862, p. 161, §§ 28-33.

Numerous authorities, ancient and modern, have been read to you on this subject. Were it necessary for you to take those books with you, and compare the different principles and cases which have been cited, your minds might meet with some embarrassments, there being in some instances an apparent, though in none, a real, incongruity. But I apprehend that you need not trouble yourselves with the books out of court; for I think I shall be able to state all the principles you will have occasion to consider; there being in fact, no disagreement about them, from the time of Sir Edward Coke, one of the earliest sages of the law, down to Sir William Blackstone, one of its brightest ornaments. These same principles, although taken from English books, have been immemorially discussed and practiced upon by our lawyers, adopted and enforced by our courts and juries, and recognized by our legislature. To prove this, I now need say no more, than that the same learned Judge Trowbridge, who was quoted by the Attorney-General, in his charge to the jury, in the trial of the soldiers for the massacre in 1770, laid down, discussed and illustrated, with great precision and clearness, every principle which can come in question in the present trial. These principles I will endeavor to simplify for your consideration.

First.—A man, who in the lawful pursuit of his business, is attacked by another, under circumstances which denote an intention to take away his life, or do him some enormous bodily harm, may lawfully kill the assailant, provided he use all the means in his power, otherwise, to save his own life, or prevent the intended

And in some of the American cases, the judges use the expressions, "*justifiable homicide*," and "*excusable homicide*" interchangeably; affixing the same meaning to each. See, for instance, Sloan's Case, *post*, where it is said by a very able judge that a person may safely act upon *appearances*, etc., and the killing will be *justifiable*; whereas, as stated by PARSONS, Ch. J., and also by PARKER, J., in the principal case, the killing of another upon a reasonable *appearance* of danger, which is not real, is *excusable* homicide.

The present editors in the notes they have made to this volume, have not attended to this distinction.

harm—such as retreating as far as he can, or disabling his adversary, without killing him if it be in his power.

Secondly.—When the attack upon him is so sudden, fierce and violent, that a retreat would not diminish, but increase his danger, he may instantly kill his adversary without retreating at all.

Thirdly.—When, from the nature of the attack, there is reasonable ground to believe that there is a design to destroy his life, or commit any felony upon his person, the killing the assailant will be excusable homicide, although it should afterward appear that no felony was intended.

Of these three propositions, the last is the only one which will be contested anywhere; and this will not be doubted by any one, who is conversant with the principles of the criminal law. Indeed, if this last proposition be not true, the preceding ones, however true and universally admitted, would, in most cases, be entirely inefficacious. And when it is considered that the jury who try the cause, are to decide upon the grounds of apprehension, no danger can flow from the example. To illustrate this principle, take the following case: A., in the peaceable pursuit of his affairs, sees B. rushing rapidly towards him, with an outstretched arm and a pistol in his hand, and using violent menaces against his life as he advances. Having approached near enough, in the same attitude, A., who has a club in his hand, strikes B. over the head before, or at the instant the pistol is discharged, and of the wound, B. dies. It turns out that the pistol was loaded with *powder* only, and that the real design of B. was only to terrify A. Will any reasonable man say that A. is more criminal than he would have been if there had been a bullet in the pistol? Those who hold such doctrine must require that a man so attacked, must, before he strike the assailant, stop and ascertain how the pistol is loaded, a doctrine which would entirely take away the essential right of self-defence. And when it is considered that

the jury who try the cause, and not the party killing, are to judge of the reasonable grounds of his apprehension, no danger can be supposed to flow from this principle.

These are the principles of law, gentlemen, to which I call your attention. Having done this, I might leave the cause with you, were it not necessary to take a brief view of some other parts of it. As to the evidence, I have no intention to guide or interfere with its just and natural operation upon your minds. I hold the privilege of the jury to ascertain the facts, and that of the court to declare the law, to be distinct and independent. Should I interfere with my opinion on the testimony, in order to influence your minds to incline either way, I should certainly step out of the province of a judge into that of an advocate. All which I conceive necessary or proper for one to do in this part of the cause is, to call your attention to the points of fact on which the cause may turn, state the prominent testimony in the case which may tend to establish or disprove those points, give you some rules by which you are to weigh testimony, if a contrariety should have occurred, and leave you to form a decision according to your best judgment, without giving you to understand, if it can be avoided, what my own opinion of the subject is. Where the inquiry is merely into matters of fact, or where the facts and the law can be clearly discriminated, I should always wish the jury not (?) to leave the stand, without being able to ascertain what the opinion of the court as to those facts may be, that their minds may be left entirely unprejudiced, to weigh the testimony and settle the merits of the case. An important rule in the present trial is, that on a charge for murder or manslaughter, the killing being confessed or proved, the law presumes that the crime as charged in the indictment, has been committed, unless it should appear by the evidence for the prosecutor, or be shown by the defendant on trial, that the killing was under such circumstances as entitle him to justification or excuse. On the point of killing,

there is no doubt in this case. The young man named in the indictment, unquestionably came to his death by means of the discharge of a pistol by the defendant at the bar. This part is confessed as well as proved. The great question in the case is, whether, according to the facts shown to you on the part of the prosecution, or by the defendant, any reasonable legal justification or excuse has been proved. Whether the killing were malicious or not, is no further a subject of inquiry than that if you have evidence of malice, although the crime charged does not imply malice, it may be considered as proving this crime, because it effectually disproves the only defence, which can be set up after a killing is established.

From the testimony of several witnesses examined by the Solicitor and Attorney-Generals, it appears that on the day set forth in the indictment, the defendant was in his office a little before one o'clock ; that, in a conversation about his quarrel with the father of deceased, he intimated that he had been informed that an attack upon him was intended, and that he was prepared. That a short time afterwards, he went down from his office, which is in the old State House, crossing State street diagonally, tending towards the United States' Bank. That, as he passed down, his hands were behind him, outside of his coat, without anything in them, is proved by the testimony of Mr. Brooks, who saw him pass down, and by that of young Mr. Erving, who saw him, when the deceased approached, put his right hand in his pocket and take out his pistol, while his left arm was raised to protect his head from an impending blow. The manner of his going down upon 'Change, the weapon which he had with him, the previous intimation of an attack, which he seems to have received from Mr. Cabot or Mr Walsh, and the errand upon which he went down, as stated by Mr. Ingraham, are all circumstances worthy of your deliberate attention. Passing down State street as before described, several witnesses testify that the deceased, who was standing with a cane in his hand,

near the corner of the Suffolk Buildings, having his eye upon the defendant, shifted his cane into his right hand, stepped quick from the sidewalk on to the pavement, advanced upon the defendant with his arm uplifted; that the defendant turned, stepped one foot back, and that a blow fell upon the head of the defendant, and the pistol was discharged at the deceased, at one and the same instant. Several blows were afterwards given and attempted to be parried by the defendant, who threw his pistol at the deceased, seized upon his cane, which was wrested from him by the deceased, who, becoming exhausted, fell down, and in a few minutes, expired. This is the general course of the testimony. The scene was a shocking one, and all the witnesses state to you that they were exceedingly agitated. This will account for the relation given by Mr. Lane, and one other witness, I believe, Mr. Howe, who state the facts so differently from all the other witnesses produced by the Government, as well as by defendant, that, however honest we may think them, it is impossible not to suppose they are mistaken. Indeed, the Attorney-General has wisely and candidly laid their testimony, so far as it differs from that of the other witnesses, out of the case. There is one witness, Mr. Glover, who states the transaction somewhat differently from the other witnesses. He says that, having expected to see a quarrel upon Exchange, in consequence of the publication against the deceased's father, in the morning, he went there for the express purpose of seeing what should pass; that he saw Mr. Selfridge coming down the street; saw young Austin advance upon him; that he had a full view of both parties; was within fifteen feet of them; that he saw a blow fall upon the head of Selfridge with violence, the arm of the deceased raised to give a second blow, which fell the instant the pistol was discharged. This is the only witness who swears to a blow before the discharge of the pistol; but he swears positively, and says he has a clear, distinct recollection of the fact; his character is left without impeachment. If you consider

it important to ascertain whether a blow was or was not actually given before the pistol was fired, you will inquire whether there are any circumstances proved by other witnesses which may corroborate or weaken the testimony of Mr. Glover. On this point, you will attend to the testimony of Mr. Wiggin, who swears that he heard a blow, as if on the clothes of some person, that he turned and saw the deceased's arm uplifted, and another blow and the discharge of the pistol were together. You will consider the testimony of Young Erving, who swears that the left arm of the defendant was over his forehead, as though defending himself from blows, when he saw the blow fall. You will consider that all the witnesses but Glover state that the blow which they saw, and thought the first, was a long blow across the head; that the blow which Glover says was the first, was a direct perpendicular blow, and that he then saw the second blow, which was a cross one, as testified by the other witnesses. If you find a difficulty in settling the fact of the priority of the blow, take this for your rule, that a witness who swears positively to the existence of a fact, if of good character, and of sufficient intelligence, may be believed, although twenty witnesses of equally good character, swear that they were present and did not see the same fact. The confusion and horror of the scene was such, that it was easy for the best and most intelligent of men to be mistaken as to the order of blows, which followed each other in such rapid succession that the eye could scarcely discern an interval. You will, therefore, compare the testimony of the witnesses where it appears to vary, attending to their different situations, power of seeing, and capacity of recollecting and relating, and settle this fact according to your best judgment, never believing a witness who swears positively to be perjured, unless you are irresistibly driven to such a conclusion. Upon this point, you will also attend to the testimony of Mr. Fales and of Mr. Osborne, and Mr. Perkins Nichols, touching the testimony of Mr. Fales. The counsel for the defendant seem,

however, to deem it of little importance to ascertain whether the blow was given before the pistol was discharged or not, as there is evidence from all the witnesses that an *assault*, at least, was made by the deceased before the pistol was fired. I think differently from them on this point. When the defence is, that the assault was so violent and fierce that the defendant could not retreat, but was obliged to kill the deceased to save himself, it surely is of importance to ascertain whether the violent blow he received on his forehead, which, at the same time that it could put him off his guard, would satisfy him of the design of the assailant, was struck before he fired or not. I doubt whether self-defence could in any case be set up where the killing happened in consequence of an assault only, unless the assault be made with a weapon which, if used at all, would probably produce death. When a weapon of another sort is used, it seems to me that the effect produced is the best evidence of the power and intention of the assailant to do that degree of bodily harm, which would alone authorize the taking of life on the principles of self-defence. But whether the firing of the pistol was before or after a blow struck by the deceased, there is another point of more importance for you to settle, and about which you must make up your minds from all the circumstances proved in the case: such as the rapidity and violence of the attack, the nature of the weapon with which it was made, the place where the catastrophe happened, the muscular debility or vigor of the defendant, and his power to resist or fly. The point I mean is, whether he could probably have saved himself from death or enormous bodily harm, by retreating to the wall, or throwing himself into the arms of friends who would protect him. This is the real stress of the case. If you believe, under all the circumstances, that the defendant could have escaped his adversary's vengeance at the time of the attack, without killing him, the defence set up has failed, and the defendant must be convicted. If you believe his only resort for safety was

to take the life of his antagonist, he must be acquitted, unless his conduct had been such prior to the attack, upon him, as will deprive him of the privilege of setting up a defence of this nature. It has, however, been suggested by the defendant's counsel, that even if his life had not been in danger, or no great bodily harm, but only disgrace was intended by the deceased, there are certain principles of honor and natural right by which the killing may be justified. These are principles which you as jurors, and I as a judge, cannot recognize. The laws which we are sworn to administer are not founded upon them. Let those who choose such principles for their guidance, erect a court for the trial of points and principles of honor; but let the courts of law adhere to those principles which are laid down in the books, and whose wisdom ages of experience have sanctioned. I therefore declare it to you as the law of the land, that unless the defendant has satisfactorily proved to you, that no means of saving his life or his person from the great bodily harm which was apparently intended by the deceased against him, except killing his adversary, were in his power—he has been guilty of manslaughter, notwithstanding you may believe with the Grand Jury who found the bill, that the case does not present the least evidence of malice or premeditated design in the defendant to kill the deceased or any other person.

“I ought to rest here; for, although I have stated to you that where a man's person is fiercely and violently assaulted, under circumstances which jeopardize his life or important members, he may protect himself by killing his adversary; yet he may from the existence of other circumstances, proved against him, forfeit his right to a defence which the laws of God and man would otherwise have given him. If a man, for the purpose of bringing another into a quarrel, provoke him so that an affray is commenced, and the person causing the quarrel is over-matched, and to save himself from apparent danger, kill his adversary, he would be guilty of manslaughter, if not of murder; because the necessity,

being of his own creating, shall not operate in his excuse.

“ You are, therefore, to inquire whether this assault upon the defendant by the deceased, was or was not by the procurement of the defendant. If it was, he cannot avail himself of the defence now set up by him. And here you are called upon to distinguish pretty nicely, and to attend to a part of the case, which I thought was going too far back to have an influence upon this trial, but which the urgency of the Attorney-General and the consent of the defendant’s counsel, finally induced me to admit. You have heard the whole story of the misunderstanding between the defendant and the father of the deceased. Who was originally in the wrong, it is not for me to say; but I feel constrained to say, that whatever provocation the defendant may have conceived to have been given him, and however great the injury which the deceased’s father may have done him, he certainly proceeded a step too far in making the publication which came out on the morning of this unhappy disaster. To call a man a coward, liar and scoundrel in the public newspapers, and to call upon other printers to publish the same, is not justifiable under any circumstances whatever. Such a publication is libellous in its very nature, as it necessarily excites to revenge and ill blood. Indeed, I believe, a court of honor, if such existed to settle disputes of this nature, would not justify such a proclamation as the one above alluded to. A posting upon ’Change, or in some public place, we have heard of, but I never before saw such a violent denunciation as this in a public newspaper. Neither can I refrain from censuring the managers of the paper who admitted such a publication, for so readily receiving and publishing, what in its very nature would tend to disturb the public peace. But, gentlemen, it is one thing for a man to have done wrong, and another thing for that wrong to be of a nature to justify an attack upon his person. If personal wrong done by the father of the deceased to the defendant, would not justify him in publishing

a libel; neither would the libel have justified the deceased, or his father, in attacking the person of the author of the libel. No man can take vengeance into his own hands; he can use violence only in defence of his person. No words, however aggravating, no libel, however scandalous, will authorize the suffering party to revenge himself by blows. If, therefore, Mr. Austin himself, the object of the newspaper publication, could not have been justified had he attacked the defendant, and beat him with a cane; still less would the circumstances have justified the unfortunate young man, who fell a victim to this most unhappy and ever-to-be-lamented dispute. For, however a young and ardent son may find advocates in every generous breast, for espousing his father's quarrel, from motives of filial affection and just family pride; yet, the same laws which govern the other parts of the case, would have pronounced him guilty, had he lived to answer for the attack, which was the cause of his death.

"The law allows a son to aid his father if beaten, and to protect him from a threatened felony, or personal mischief, and in like cases a father may assist a son, and should a killing in either case take place, it is excusable; but neither one nor the other can justify resorting to force to avenge an injury, consisting in words, however opprobrious, or writings, however defamatory. You will therefore, consider, whether these facts, antecedent to the meeting on 'Change, can have much operation in the cause, let which party will, be found by you to be in the wrong.

"Upon the whole, therefore, of these circumstances, should you be of opinion that the defendant, in order to avenge himself upon the father of the deceased, prepared himself with the deadly weapon which he afterwards used, went upon 'Change with a view to meet his adversary and expose himself to an attack, in order that he might take advantage of and kill him, intending to resort to no other means of defence in case he should be overpowered, there is no doubt the killing

amounted to manslaughter. But, if from the evidence in the case, you should believe that the defendant had no other view but to defend his life and person from an attack which he expected, without knowing from whom it was to come; that he did not purposely throw himself in the way of the attack, but was merely pursuing his lawful vocations, and that in fact he could not have saved himself otherwise than by the death of the assailant, then the killing was excusable, provided the circumstances of the attack would justify a reasonable apprehension of the harm which he would thus have a right to prevent. Of all this you are to judge and determine, having regard to the testimony of the several witnesses who have given evidence to these several points in the defence. The principles which I have thus stated are recognized by all the books which have been read, and are founded in the natural and civil rights, and in the social duties of man.

“The last subject on which I shall trouble you, is the address which has been so forcibly urged upon your minds by the counsel on one side, and as zealously and ably commented upon by the Attorney-General on the other, touching the necessity of excluding all prejudices and prepossessions relative to this cause. I do not apprehend these observations were in any degree necessary, as I cannot bring my mind to fear that the verdict of twelve upright, intelligent jurors, selected by lot from the mass of their fellow-citizens, will be founded on anything beside the law and evidence applicable to the case. Every person of this numerous assembly, let his own opinion of the merits of the cause be as it may, must be satisfied of the fairness, regularity and impartiality of the trial, up to the present period; and sure I am, that nothing which is left to be done by you will impair the general character of the trial. If you discharge your duty conscientiously, as I have no doubt you will, whether your verdict be popular or unpopular, you may defy the censure, as I know you would disregard the applause, of the surrounding multitude.

"Least of all do I apprehend that party spirit will come in to influence your opinions. However the storms of party rage may beat *without* these walls, I do not believe the time has yet come when they shall find their way *within*. Nor do I believe that a general apprehension is entertained that a man accused of a crime is to be saved or destroyed according to the political notions he entertains. If ever the time should come that a general belief shall be entertained that trials are conducted and judgments given, with a view to the political character of parties interested, vain and ineffectual will be the forms of your constitution, and useless the attempts to administer the laws. A general resistance would be the consequence, and if this belief should be founded in fact and in truth, that resistance would, in my apprehension, be perfectly justifiable; for no people would be bound to respect the *forms* of justice when the substance shall have vanished; when the fountains of justice shall be manifestly corrupt, and the forms and parade adhered to for the purpose of imposing on the citizens, and subjecting them to oppression under the garb of law.

"You, gentlemen, will not be the first to violate the solemn oath you have taken, and seek for a conviction or an acquittal of the defendant upon any other principles than those which that oath has sanctioned. And as I trust that in performing my duty, I have conscientiously regarded that oath which obliges me 'faithfully and impartially to administer the laws according to my best skill and judgment,' so that in discharging yours, you will have due regard to that which imposes upon you the obligation, well and truly to try the cause between the Commonwealth and the defendant, according to law and the evidence which has been given you."

Verdict, not guilty.

NOTE.—Mr. Wharton in his works on criminal law has devoted much space to this case. See his *Law of Homicide*, pp. 170–175, and 417–460, and his *Criminal Law*, vol. 2, 5th edition, note to § 1,026. He has criticized it severely, and even intimated that it was decided on *political* and not on *legal* grounds. However justly the profession may have been, as Mr.

Wharton states they were, surprised at the *result* of the trial, we are not aware of any case in which the *law* of the case, either as expounded by the Chief Justice to the Grand Jury or as expounded by Mr. Justice PARKER to the Traverse Jury, has met with adverse judicial criticism. On the contrary, the principles enunciated in the charge of Mr. Justice PARKER have been approved and followed in numerous cases. See, for instance, Logue's case, *post*; Field's case, *post*; Shorter's case, *post*; Neeley's case, *post*, and Sloan's case, *post*. In the earliest Michigan case on this subject, the three general statements of doctrine laid down by Mr. Justice PARKER in his charge, [*supra*, pp. 17, 18,] have been explicitly approved and adopted. See *People v. John Doe*, *post*.

One of the objections made by Mr. Wharton to this case, seems to consist in the manner in which Mr. Justice PARKER expounded the duty of retreating, which the law puts upon the person assailed before taking life. Mr. Wharton says: "There may be cases sometimes occurring, though very rare and of dangerous application, where a man in case of a *personal conflict*, may kill a man without retreating to the wall. The assault may have been so fierce as not to allow him to yield a step, without manifest danger of his life or enormous bodily harm; and then, in his defence, if there be no other way of saving his own life, he may kill his assailant instantly. The distinction between this kind of homicide and manslaughter is, that here the slayer could not otherwise escape, although he would; in manslaughter he would not escape, if he could. Thus, if A. assault B. so fiercely that giving back would endanger his life, in such case it is agreed that the party thus attacked need not retreat, in order to bring his case within the rule of necessity in self-defence; or, if in the assault, B. fall to the ground, whereby he could not fly, in such case if B. kill A. it is in self-defence upon chance-medley. *Such were the principles laid down in Selfridge's case, which produced in that instance as they will in all others where they are presented without the qualifications attached to them by the common law authorities, a verdict which surprised the profession, and tended to lessen the sanctity of human life.*" Notwithstanding the subsequent context, we have never been able to understand fully the nature of the qualifications to which Mr. Wharton refers. So far as our reading goes, the only qualifications put upon this branch of the principal case, by subsequent cases, operate rather to extend than to restrict the rule. As a general rule, the question is not minutely analyzed in the cases; but the tendency is rather to follow the loose dicta of the text writers. Of these we think there is but one who has expounded in a philosophical manner this branch of the law of self-defence. We allude to Mr. Bishop, whose peculiar happiness it has been to have his reasoning and conclusions adopted by courts of eminent character in several instances. See, for instance, *Stoffer's case*, and *Pond's case*, *post*. Advancing into the reasons of the law, rather than seeking to collect the conclusions of adjudged cases upon this point, this eminent writer shows us that the true distinction which the law makes between the right to kill without retreating, and the duty, or rather necessity, which the law generally puts upon the assailed, of retreating before taking life, rests upon the question whether the assault is manifestly *felonious* in its character, or whether a trespass less than a felony is intended. For at common law all felony was punished

with death ; and therefore, it came to be a conclusion of law that the killing of a felon, in necessarily resisting the commission of a felony is *justifiable homicide*. See 1 Bish. Crim. Law, 5th ed., § 849 *et seq* ; Oliver's case, *post* ; Pond's case, *post*. Perhaps the rule, as stated by Sir Michael Foster, has never been questioned, while it has been quoted and followed in innumerable instances, and has passed into statute in several of the United States. It is : "Where a known felony is attempted upon the person, be it to rob or murder, here the party assaulted, may repel force by force ; and even his servant attendant upon him, or any other person present may interpose for preventing mischief ; and if death ensueth, the party so interposing will be justified. In this case, nature and social duty co-operate." Fost. Cr. Law, 274. The same principle is thus stated by Mr. East—a formula which has been more frequently adopted by American judges than any other : "A man may repel force by force in the defence of his person, habitation or property, against one who manifestly intends or endeavors, *by violence or surprise*, to commit a *known felony*, such as murder, rape, robbery, arson, burglary, and the like, upon either. In these cases, he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger ; and, if he kill him in so doing, it is called *justifiable self-defence*." 1 East P. C. 271. This principle is limited, on the one hand, to felonies of a forcible and violent character. 1 East P. C. 273 ; Pond's case, *post* ; 4 Bla. Com. 184, Moore's case, *post* ; and see Gray v. Coombs, *post*. And on the other hand, it is extended so as to justify killing in the suppression of riots ; which, although misdemeanors at common law, yet bring in their train numerous felonies. Pond's case, *post* ; Com. v. Daley, 4 Penna. Law Jour. 150 ; S. C., Whart. Hom. 475 ; 4 Bla. Com. 179. And again, it is so far limited by the rule of *necessity*, upon which the right to kill in defence of person, habitation or property is universally placed, that a person may not lawfully kill another who is attempting a felony, if, by arresting or disabling him, or otherwise, he can prevent the threatened felony. Pond's case, *post* ; Rex v. Scully, 1 Car. & P. 319. Nor will he be justified in slaying the felon after he has desisted from the attempt and taken to flight. Rutherford's case, *post*.

It is seen, then, that according to the universally received doctrine, laid down by Mr. East, as above quoted, homicide without retreating is justified when necessary in resisting forcible felonies ; and this without any distinction whether the felony were attempted against the person, or the habitation, or other property ; but in each case, the killing must be necessary to prevent the felony. It is right here that the principal difficulty arises. Mr. Bishop justly intimates that upon principle, it can make no difference whether the felony be attempted against another person or against myself. In either case, the law imposes upon me the active duty of resisting the commission of the felony ; and if the felony be attempted upon another, and I fail to resist, I am guilty of a misdemeanor, called misprision of felony ; and, if the felony be attempted against myself and I fail to resist, I am technically guilty of the same offence, though not amenable to punishment. 1 Bish. Crim. Law, 5th ed., § 851. But where the attempted felony consists in an assault upon my person, so that it becomes a simple question of personal defence, not only the law as laid down by PARKER, J., in the principal case, but also as laid down in the text books and most

of the adjudicated cases, requires me to retreat, if I can, before killing the assailant, without apparently making any reference to the distinction whether the assault be felonious or non-felonious in its character. See, for instance, Drum's case, *post*, where it is said without reference to the character of the assault to be repelled, that the law requires that one man must retreat before another shall die; also Benham's case, *post*.

This is clearly the doctrine in cases of non-felonious assaults, and in cases of mutual broils and combats, where the law supposes both parties in some measure culpable. 4 Bla. Com. 184; Foster Cr. Law, 276; 1 Bish. Cr. Law, 5th ed., §§ 869, 870; Riley's case, *post*, where the rule is clearly stated; Robertson's case, *post*; Well's case, *post*; Meredith's case, *post*; Sullivan's case, *post*. But if applied to all cases where a person going his lawful way is assaulted, without reference to the question whether a felony, or a mere trespass on the person, is manifestly intended, it would require a man to flee before another who murderously assails him, or a traveller to flee before a highway robber, or a woman to flee before her would-be ravisher, before resorting to the extreme measure of defence. It is safe to say that the law puts upon a person no such necessity. The old writers in speaking of *justifiable homicide*—that is, homicide committed in the resistance of felonies—make no mention of the duty of retreating. Foster, 273, 4 Bla. Com. 180, 181, 182; 1 Hale, P. C., 488; 1 East, P. C., 271. Nor do the cases which discuss this question, so far as we know. See Oliver's case, *post*; Harris' case, *post*; Rutherford's case, *post*; Roane's case, *post*, and Payne's case, *post*. Except to state that retreat in such cases is not necessary, Pond's case, *post*. And it is safe to say, that if an assault is manifestly felonious—or, to repeat an expression above quoted, if a "known felony" is attempted—the person assailed, being himself innocent, may ordinarily kill the assailant without retreating. Accordingly it is stated by Mr. Bishop, that where an attack is made *with murderous intent*, the person attacked is under no obligation to flee, but may stand his ground, and, if need be, kill his adversary. 1 Bish. Cr. Law, 5th ed., § 850. And this is clearly the law. See James D. Kennedy's case, *post*.

Whether this murderous intent exists, will more frequently than otherwise be determined by the character of the *weapon* with which the assault is made. Accordingly, we find it stated in several cases in Iowa, that a person is not obliged to flee from another who assails him with a deadly weapon. Tweedy's case, *post*; Thompson's case, *post*, and John Kennedy's case, *post*. We shall see further on, in SUBDIVISION D., of this PART of the present volume, that murderous threats previously made and communicated to the assailed, and previous attempts at assassination or other hostile conduct, as well as the character of the assailant for violence, are elements which the assailed is entitled to consider in determining whether the assault is felonious in its character or not.

We think, then, that the proposition stated by Mr. Justice PARKER, [*supra*, pp. 17–18,] to which we have been chiefly alluding in this note, namely, that "a man who, in the lawful pursuit of his business, is attacked by another under circumstances which denote *an intention to take away his life*, or do him some enormous bodily harm, may lawfully kill the assailant, provided he use all the means in his power, otherwise, to save his own

life or prevent the intended harm—such as *retreating as far as he can*, or disabling his adversary without killing him—if it be in his power,”—is inaccurate, and that the error consists, not as Mr. Wharton supposes, in extending the right of defence beyond the limits recognized by the common law authorities, but in restricting it to a less compass than those limits, so as to require him who is murderously assailed, to retreat from the felonious assailant, in all cases where he safely can. The error consists in confounding the doctrine applicable to cases of self-defence in mutual combat, which Sir Michael Foster calls *self-defence culpable*, with defence against the commission of felonies, which the same writer calls *justifiable self-defence*. If a man who is murderously assailed is obliged in all cases to retreat before killing, there may be no limit to his retreating so long as his enemy shall pursue his murderous intent. He may be obliged to hide away from his adversary continually, and carry on his business stealthily by night, as did the unfortunate defendant in Monroe’s case, *post*. We repeat our conviction that the law does not thus leave it to the pleasure of a felon to determine whether an innocent man may pursue his just way, or whether he shall be obliged to fly. The rule, then, which is laid down in Sullivan’s case, *post*, and repeated in Shippey’s case, *post*, that the right to defend one’s self does not arise until the defendant has at least attempted to avoid the necessity of that defence, must not be understood as putting upon an innocent person who is murderously assailed, the necessity of retreating before he can kill his assailant; but must be held to apply to cases where the assailed is himself in some fault, or where the assault is not, in its character, manifestly felonious. See Bohannan’s case, *post*, where a judgment was reversed, because the law was thus charged, in a case where the slain had attempted to assassinate the defendant, and was seeking his life at the time the killing took place. In one case of non-felonious assault, we find it distinctly laid down, that the assailed is not obliged in such cases to retreat before killing. See Isaac’s case, *post*, where the charge containing this proposition was approved by the Supreme Court. But Isaac’s case rests upon a special statute, and hence need not be noticed further.

Nor does the law on the subject of retreating, as stated by Mr. Justice PARKER, accord with the rule on the same subject, as laid down by the Chief Justice in his charge to the Grand Jury in the principal case. He said: “A man may repel force by force in defence of his person against any one who manifestly intends or endeavors, by violence or surprise, *feloniously to kill him*. And he is not obliged to retreat, but may pursue, until he has secured himself from all danger; and if he kill him in so doing, it is *justifiable homicide*.” Place this proposition side by side with that stated by Mr. Justice PARKER, and it is seen at a glance that the two cannot stand together. According to the latter, he who is murderously assailed must retreat, if he can, before killing, while according to the former, he may stand his ground and repel force by force, even unto the death. And we have seen that the proposition, as stated by the Chief Justice, is clearly the law, and has been, as Blackstone states it, since the time of Bracton. 4 Bla. Com. 180.

It is believed, though not stated with entire confidence, that an examination of the American cases will show that the duty of retreating before

killing, or of doing all in the defendant's power to avoid the necessity of killing, has not been laid down in any case in the unqualified manner in which Mr. Justice PARKER states it, except in cases of non-felonious assault, like the principal case and Benham's case, *post*; or in cases of mutual combat, like Drum's case, *post*; or in cases where the defendant was clearly in the wrong, like Sullivan's case, *post*, John Doe's case, *post*, and Shippey's case, *post*; or where the quality of the transaction is doubtful, as in Cole's case. 4 Park., C. C. 35. And see Copeland's case, *post*—a case very much like the principal case in some of its facts, where the question of retreating was not considered at all.

To recapitulate, though at the expense of brevity :

1. The obligation to retreat does not arise at all in ordinary cases; but the assailed may stand his ground and repel force by force, using no more force than is necessary to accomplish his defence. Gallagher's case, *post*; Drum's case, *post*; State v. Wood, 1 Bay, 351.

2. It is only when the assault is so fierce, or when the combat waxes so hot, that a choice of one of three things is forced upon the person defending—either to retreat himself, or to suffer death or great bodily harm, or to kill his assailant,—that the question as to the duty of retreating arises at all. In other words, this question does not arise until it becomes a question whether one man shall retreat or another man shall die. Drum's case, *post*; Riley's case, *post*; Benham's case, *post*.

3. In such cases—

a. If the assault is manifestly felonious—if it involves a known felony, such as rape, robbery or murder, the assailed is not obliged to retreat, but may kill the assailant instantly, if the felony cannot be prevented by other means than retreating. Pond's case, *post*; James D. Kennedy's case, *post*; 1 Bish. Cr. L., § 849 *et seq.*, 5th ed.; Foster, 274; East, 271; Tweedy's case, *post*; Thompson's case, *post*; John Kennedy's case, *post*.

b. But, if the assault is non-felonious in its character—as if only a moderate battery or trespass upon person or property is intended; or, if it be a mutual combat, then the party defending must “retreat to the wall,” if he safely can, before the law will excuse killing. Drum's case, *post*; Riley's case, *post*; Benham's case, *post*.

4. A man being in his habitation is “at the wall” and “in his castle,” and is not obliged to retreat under any circumstances. Pond's case, *post*; Carroll's case, *post*. But even there, he may not needlessly take life in his defence. Greschia's case, *post*; Meade's case, *post*; Rector's case, *post*; Carroll's case, *post*; Decklott's case, in note to John Kennedy's case, *post*.

Upon the facts of Selfridge's case, however, there can be no doubt that nothing more than a severe chastisement was intended, or was probable to the comprehension of a reasonable man. There is no ground whatever for supposing that Selfridge was placed in that extreme peril, which rendered it necessary to kill without retreating; or, at least, without calling upon the bystanders for aid. Hence, Mr. Wharton was not entirely in error in referring it to that class of cases, known as cases of “personal conflict,” which rest upon the same principles as cases of non-

felonious assault; so far as the duty of retreating is concerned; nor was the charge of Mr. Justice PARKER on the question of "retreating to the wall" liable to objection, so far as it applied to the facts of this case; but only so far as it attempts to lay down a general rule, applicable to all cases. It was, indeed, a political case, in some aspects; for it is said to have presented the curious spectacle of the two great political parties arrayed against each other over the result of a single trial. Cunningham's Correspondence, 70; Whart. Hom. 174. In the Law Reporter, vol. 4, p. 89, an account of this case is given under the head of "Remarkable Trials," from which the statement of the facts, as we have given them, is taken. In this account it is said that the trial "was attended with greater excitement than any other which ever occurred in this country. It is almost impossible for the present generation to comprehend the deep political feeling of that day — [this was in 1841—we have learned it since],—or to appreciate the bitterness and acrimony which existed between the two great political parties. * * * * *

Accordingly the newspaper press in all parts of the country was filled with comments upon the matter, and little regard was often paid to truth or decency in these ebullitions of political partisans."

Notwithstanding that such was the character of the case, it is to be observed that it is stated by BRONSON, J., in Shorter's case, that this was one of the cases which the revisers of the New York Statutes professed to have followed in drafting their statute on justifiable homicide—a statute which has been followed in the Codes of Wisconsin, Minnesota, Missouri, Kansas, and perhaps other States.

UNITED STATES v. WILTBERGER.

[3 WASH. C. C. 515.]

*Circuit Court of the United States. Pennsylvania,
October Term, 1819.*

BUSHROD WASHINGTON, Associate Justice Sup. Court.
RICHARD PETERS, District Judge.

DEFENCE AGAINST NON-FELONIOUS ASSAULT—DEFENCE BY MASTER OF
VESSEL AGAINST MUTINOUS ASSAULT—IMMINENCE OF THE DANGER
—JURY JUDGES OF THE NECESSITY OF KILLING.

1. Manslaughter defined.

2. A man may oppose force to force in defence of his person, his family, or property, against one who manifestly endeavors, by surprise or violence, to commit a felony, as murder, robbery, or the like. [Acc. Thomp-

son's case, *post*; John Kennedy's case, *post*; Pond's case, *post*; Selfridge's case, and note, *ante*; and many others.]

3. But the intent must be to commit a *felony*. If it be only to commit a trespass, as to beat the party, it will not *justify* the killing of the aggressor. No words, no gestures, however insulting and irritating—not even an assault, will afford such justification; although it may be sufficient to reduce the offence from murder to manslaughter. [Acc. John Kennedy's case, *post*, and notes.]

4. The intent to commit a felony must also be *apparent*; which will be sufficient, although it should afterwards turn out that the real intention was less criminal, or was even innocent. This apparent intent is to be collected from the attending circumstances, such as the manner of the assault, the nature of the weapons used, and the like. [Acc. Selfridge's case, *ante*; Neeley's case, *post*; Shorter's case, *post*; Logue's case, *post*; Meredith's case, *post*; Lamb's case, (Supreme Court and Court of Appeals,) *post*; Dyson's case, *post*; Pond's case, *post*; Cotton's case, *post*; Scott's case, *post*; Schnier's case, *post*; Adam's case, *post*; Maher's case, *post*; and others.]

5. To produce this justification, it must moreover appear that the danger was *imminent*, and the species of resistance used, necessary to avert it. [See, as to the imminence of the danger, Wesley's case, *post*; Dyson's case, *post*; Cotton's case, *post*; Lander's case, *post*, and Evan's case, *post*. It is likewise sufficient if the danger is *apparently* imminent. Sullivan's case, *post*; Shorter's case, *post*, and note.]

6. Whether the apparent danger to the defendant was sufficient to justify the use of the weapon resorted to, is a question of fact for the jury. [Acc. Selfridge's case, *ante*; Harris' case, *post*; McLeod's case, *post*; Cotton's case, *post*; Oliver's case, *post*; and other cases.]

7. The fact that a combination had been formed amongst the seamen on board a vessel, to resist any attempt on the part of the commander to strike or correct them, will not justify the killing of one of such seamen by the commander, unless it be made to appear that the fact of such combination had been communicated to the commander at the time of the killing, and that at the time of the killing, mutiny and resistance was intended and imminent.

8. It seems that the commander of a vessel, when assaulted by one of his men on board his vessel, is not obliged to retreat; and that if, in resisting such assault, he kill his assailant, he will be entitled to more indulgence than would a person on land, and that slighter evidence will justify the killing; but nevertheless, it must be shown that a necessity for the killing existed, to prevent an apparent intention of committing a felony.

This was an indictment for the *manslaughter* of one Peters, a mariner, on board the ship Benjamin Rush, committed by the defendant, the master of said ship. The offence was charged to have been committed on board this vessel, an American bottom, on the high seas.

An objection was made to the *jurisdiction*; the vessel at the time of the homicide, lying at anchor in a river in China.

The material parts of the evidence relating to the offence as charged, are stated in the instructions to the jury.

Charles J. Ingersoll, District Attorney, for the prosecution; *J. Sergeant* and *Joseph R. Ingersoll*, for the defendant.

* * * * *

Upon the merits, it was insisted, by the counsel for the defendant, 1st., that the blows inflicted upon the deceased by the defendant, were not the cause of his death; and that the evidence clearly established that it was produced by a mortification of the stomach, caused by the improper use of an ardent spirit, distilled in China, and known by the name of Samchoo.

2d. That, if the death was caused by the blows, still the homicide was justifiable, on account of the menacing attitude of the deceased, and the combination which had been formed amongst the crew to resist the master, in case he should strike any one of them.

WASHINGTON, J., charged the jury: The evidence may be arranged under two heads—1st, that which relates to the death of Peters; and 2d, to the cause of it.

1. Coles, the witness most relied upon by the defendant's counsel, to justify his conduct upon this unfortunate occasion, has testified that the deceased, being aloft, was called down by the defendant, in consequence of some expressions of discontent at being sent up, which were not distinctly heard by the defendant. As he went aft to the quarter deck, where the defendant was standing, he pulled off his jacket, rolled up the sleeves of his shirt, and approached the defendant with folded arms. Being asked by the defendant what he was grumbling at, he complained of being unwell, and was ordered by the defendant to go below, accompanied with an observation, that he knew that no person on

board, in that situation, was required to do duty. The defendant then turned his back upon Peters, and walked to and fro on the quarter deck. Peters still continued on the deck; altered the position of his arms, and, with his fists clenched, and in a menacing attitude, impertinently addressed the defendant, observing, "you call me down, with intention, I suppose, to flog me; I wish to know if you mean to do it or not?" To which the defendant answered, "if you want flogging, I will flog you;" and immediately struck the deceased with his fist. About this time, Clark, another seaman, came abaft the windlass, and then Peters sprang toward the defendant; but whether he struck the defendant or not, the witness could not testify. The defendant then picked up a stave, (which all the witnesses say was of white oak and large,) and struck Peters with it on the head. Immediately after this, a conflict took place between the defendant and Clark, the latter having grasped the right arm of the defendant with one of his hands, and his collar with the other. Clark was ordered to go forward, which he did, but immediately afterwards returned; and the order being repeated, he refused, with insolent language, to do so; which was followed by a blow, inflicted on him by the defendant with the stave, which Clark returned with another stave, and prostrated the defendant; Clarke then went forward, and here the affray ended.

As to the throwing off his jacket, and rolling up his sleeves, by Peters, Coles is supported by two other witnesses. Some evidence was given by another witness, as to the menacing attitude of Peters, after the defendant told him to go below; and two other witnesses have testified, that the defendant struck Peters with his fist, not in the first instance, but after he had been stricken with the stave, and as he fell. The advance of Clark at the time mentioned by Coles—the springing of Peters towards the defendant, and the seizing of the defendant by Clark, are facts unsupported by any other witness, and are in effect, contradicted by them. Coles

saw but one blow with the stave. The other witnesses speak of two, and three; and all agree that from the time that Peters was knocked down, he continued speechless and senseless till his death, which happened about eighteen hours afterwards. Upon this evidence, the first question is, whether this homicide, (if attributable to the defendant,) amounted to the crime of manslaughter?

Manslaughter is the unlawful killing of another, without malice, either express or implied. It differs from murder in the important particular of the absence of malice; as where it happens in a sudden heat, when passion has obtained the dominion over reason and the gentler feelings of the heart. From a respect to human infirmities, our law, in such a case, mitigates the offence of murder into manslaughter, as well as the punishment. Still, however, this offence is unlawful; the law not permitting any man to avenge his own wrongs, unless in a case of great emergency, by the death of the supposed offender.

The present case is one which the defendant's counsel have contended is justified by law;—justified, they say, upon the ground of self-defence.

As to this, the law is, that a man may oppose force to force, in defence of his person, his family, or property, against one who manifestly endeavors, by surprise or violence, to commit a felony, as murder, robbery, or the like.

In this definition of justifiable homicide, the following particulars are to be attended to. The intent must be to commit a *felony*. If it be only to commit a trespass, as to beat the party, it will not *justify* the killing of the aggressor. No words, no gestures, however insulting and irritating, not even an assault, will afford such justification, although it may be sufficient to reduce the offence from murder to manslaughter. In the next place, the intent to commit a felony must be *apparent*; which will be sufficient, although it should afterwards turn out that the real intention was less criminal, or was

even innocent. This apparent intent is to be collected from the attending circumstances, such as the manner of the assault, the nature of the weapons used, and the like. And, lastly, to produce this justification, it must appear that the danger was imminent, and the species of resistance used, necessary to avert it.

Nailor's case^a is a strong exemplification of the law, as here stated. The homicide was decided to be manslaughter, and not murder; because it took place in a sudden affray, and in the heat of passion. But it was not considered justifiable, because the apparent intent of the deed, was merely to rescue the father, and by no means to affect the life of the deceased; and there was no such danger as could render the use of the weapon which caused the death, necessary.

The case of the adulterer, killed by the offended husband, at the moment when he discovers his dishonor, is another, and a very strong example of the rule; although no provocation can be more difficult to bear with, yet the law does not reduce the offence below that of manslaughter.

It is for you, gentlemen of the jury, to say, upon the whole of the evidence given in this case, whether there was any intention in the deed, apparent or otherwise, to take the life of the defendant, or to commit any known felony; and whether there existed any danger, which rendered it necessary for the defendant to use the weapon which he did.

It is contended by the defendant's counsel, that the combination amongst the seamen to resist any attempt of the defendant to strike or to correct them, affords a ground of justification, which distinguishes this from ordinary cases of a simple assault, happening on land. This distinction is inadmissible in the present case, for the following reasons:

1. There is no evidence that this combination, if it was ever formed, was at any time communicated to the defendant.

^a 1 East P. C., 277.

2. The circumstances of the moment afforded no indication that mutiny or resistance of any kind was intended, much less, "that it was imminent"; as there was but one seaman on the deck beside Peters, who appeared to take any part or interest in the affray, and the appearance of that seaman, was subsequent to the termination of the conflict between the defendant and Peters.

Some indulgence, we admit, may be claimed by the master of a vessel, beyond what the law extends to a person on shore. He may not be required to retreat, when assaulted by a seaman, so as thereby to indicate fear, and to diminish his authority, so essential to the due subordination of his crew. In like manner, slighter evidence of danger may be admitted in his justification, than in that of a person on land. Still it must be shown, that there was a necessity for what he did, to prevent an apparent intention to commit a felony. Even an officer of justice, who has a warrant commanding him to arrest a person, must prove resistance; and that the act, which occasioned the death of the party to be arrested, was necessary.

* * * * *

As to the question of jurisdiction, there will be no necessity for the Court to give an opinion upon it, if you should think that the defendant is not guilty of the offence of manslaughter.

Should your opinion be unfavorable to the defendant, you will find him guilty, subject to the opinion of the Court upon the facts of the case.

The jury found the defendant guilty, subject to the opinion of the Court, upon a case stated, upon which the question of jurisdiction was carried to the Supreme Court.^b

^b See 5 Wheaton, 76, where the question of jurisdiction is decided in favor of the prisoner.

COPELAND v. THE STATE.

[7 HUMPHREYS, 429.]

Supreme Court of Tennessee, December Term, 1846.

NATHAN GREEN,	} <i>Judges.</i>
WILLIAM B. REESE,	
WILLIAM B. TURLEY,	

ASSAULT WITH DANGEROUS WEAPON—KILLING ASSAILANT JUSTIFIABLE—
MANSLAUGHTER—OLD GRUDGE.

1. In criminal cases, the Court will weigh the testimony, and if it preponderates against the verdict, they will grant a new trial. And a conviction of murder in the second degree in this case, is reversed upon an examination of the proof adduced.

2. If the prisoner was going her own road in a laudable pursuit, and was assailed in that road with a hickory stick of dangerous character, and thereupon slew her adversary with a knife, this was homicide in self-defence.

3. If the prisoner, upon meeting her adversary unexpectedly, who had intercepted her upon her lawful road, and in her lawful pursuit, accepted the fight, when she might have avoided it by passing on, the provocation being sudden and unexpected, the law will not presume the killing to have been upon the ancient grudge, but upon the insult given by stopping her on the way; and it would be manslaughter.

4. If the deceased was approaching the prisoner's path with the intention to assail the prisoner, and became irresolute and stopped, or abandoned her intention, leaving the prisoner full and unobstructed right and liberty to pass, and prisoner brought on the attack with the design to slay deceased, the killing would be murder in the first or second degree, according to circumstances. That is, if the killing was the result of the old grudge, and a previously premeditated intention, it would be murder in the first degree; but if it were the result of malice, suddenly produced by the sight of her enemy, without premeditation, it would be murder in the second degree.

5. Where the deceased went upon the path of the prisoner, armed with a dangerous club, intending to inflict some severe punishment upon her; and stopped upon her path and awaited her coming; and the prisoner kept on her way, determined to resist and protect herself, be the consequences what they might; and the deceased commenced the combat, and the prisoner killed her; this was not murder in the first or second degree, but was homicide in self-defence, or at most, manslaughter. [Contra, if she might have avoided the danger by retreating. Selfridge's case, *ante*; John Doe's case, *post*; Benham's case, *post*. But, see note to Selfridge's case.]

Mary Copeland was indicted in the Circuit Court of Overton County, for the murder of Ruth Dougherty.

The cause came on for trial before Judge Caruthers, at the March term, in 1844, and was then submitted to a jury. Defendant was convicted of murder in the second degree, and appealed.

The facts are stated at length in the opinion of the Court, and are in brief, as follows:

Mary Copeland, upon strong grounds of suspicion, believed that her husband was guilty of illicit intercourse with Ruth Dougherty; she talked about the matter, complained to her neighbors, watched the house where Ruth resided, and threatened to take her life, if the unfaithful conduct of her husband was continued. Ruth was well aware of the conduct, feelings and threats of Mary Copeland, and also made frequent threats of taking the life of the latter. Mary Copeland, on the persuasions of her neighbors, desisted from her threats, and determined to bear the wrong. Ruth was about to leave the county of Overton for Kentucky, and declared she would have revenge. And, on Sunday morning, as Mary Copeland passed the house of Alexander Dougherty on her way to church, Ruth came out, with the apparent intention of insulting and beating her. She carried in her hand a long hickory stick.

The testimony as to the commencement of the assault was various, and, in some degree, contradictory; some of the witnesses testifying that Ruth intercepted Mrs. Copeland in her path, and gave her, first, two severe blows with the stick in the path; whilst others state, that Ruth halted in her progress, with the apparent intention to abandon her contemplated assault, and that Mary Copeland left the path in which she was, and advanced rapidly upon Ruth, and stabbed her with a knife several times, which stabbing caused her immediate death.

These facts were submitted to the jury, under the charge of presiding Judge, which is as follows:

1. If the defendant, on seeing the deceased moving out toward her path, advanced to meet her with intent to kill her, or to engage in combat with deadly weapons, and did so engage and kill her, the homicide was murder. It would be no odds upon this hypothesis, which advanced most rapidly, which started first, how deadly was the deceased's intention, which struck first, no matter if the deceased struck first with a stick which was dangerous to life. If defendant advanced to the rencounter with deadly intentions, she was guilty of murder. So would the other have been. Like duellists, either that kills is a murderer; whether it would be murder in the first or second degree, would depend upon the question whether the deadly intent was produced by anger or by reflection. Anger is not presumed without provocation. It is an effect that must be produced by an adequate cause. But if, on seeing her enemy advancing, she became excited, and, from that impulse, determined to meet her in deadly combat, it would be sufficient to extenuate the killing to the second degree of murder. But if, on seeing her, it aroused her slumbering revenge, and she deliberately determined to avail herself of that opportunity to kill her, it would be the first degree of murder.

2. If the defendant advanced to the combat with intent to fight merely, but not with deadly weapons, and thereupon they engaged, and in the heat of the combat, defendant killed the deceased, it was manslaughter; no matter on this hypothesis about the former malice of either, nor which struck first; nor how dangerous may have been the assault of the deceased. As she met the danger voluntarily, and of her own fault, she would not be excusable. When persons engage in fight voluntarily, they must do all they can to decline it, before they are excusable in killing.

3. If she was going along her road ignorant of Ruth's advance, or if she saw her, not apprehending an assault from her, or even if she did apprehend an assault, yet determined not to fight unless necessary for

her defence, and Ruth intercepted her, and committed an assault upon her, which endangered her life, or threatened her with great bodily harm, and she thereupon killed in her own defence, it was justifiable homicide, and you must find her not guilty. If she was not really in danger of death or great bodily harm, but, upon reasonable evidence, believed herself so, she might justifiably kill.

Turney, Goodall & Gardenhire, for the prisoner;
the Attorney-General, for the State.

TURLEY, J., delivered the opinion of the Court:

This case presents to our consideration, another of those afflicting tragedies, which, unfortunately, are but too common, resulting from the gratification of loose and vicious propensities, regardless of social and moral duty. A husband, forgetful of the sacred obligations of his marriage vow, forgetful of the legal and holy rights of his neighbor, by which the purity of his daughter should have been protected from his lawless passion, has, in an evil hour, brought desolation upon his own house, and death into that of another. A man advanced in life, with a wife with whom he had lived, until she had presented him with grandchildren, when it would be reasonable to suppose that the fiery passions which so often lead astray, had been calmed and brought under proper control, has nevertheless, as there is too much reason to believe, corrupted the daughter of his near neighbor, and lived with her in adultery for years.

The consequences of this great crime are horrid to think of; they have ended in the death of his paramour, by the hands of his own wife; and in her conviction of the crime of murder, and a sentence of confinement in the penitentiary of the State for a period of ten years; a period, very probably, equal to the extent of the remainder of her life. This poor woman, who from all the proof in the record, has obviously been "more sinned against than sinning," and upon whose head this calamity has fallen, a calamity more fearful, if possible,

in its consequences to her, than that which befell her misguided and unhappy rival, has appealed to this Court as her last resort, for the purpose of ascertaining, whether she cannot be released from it.

We do not deem it necessary to disguise, that our sympathies are enlisted in her favor; and that we have examined this record with the view of ascertaining if there were any legal grounds upon which we could be justified in giving her a new trial, and with an anxious desire that they might be found. But at the same time, we deem it proper to observe, that in coming to the conclusion we have, we are not sensible that our sympathies mislead our judgment, or bias our decision.

It is true, that in scrutinizing the charge of the Judge, we have been able to find no legal error therein; yet we cannot entirely divest ourselves of the belief that if he had been a little more particular in applying the legal distinctions, which he has correctly drawn, to the particular facts of the case, the result might have been different. But, be that as it may, there is no error in this, for which we can reverse.

The consequence of this is, that if we grant a new trial, it must be upon a careful examination of the proof adduced, and a deliberate conviction, that it is not of a character to justify the verdict which has been returned by the jury.

We have said, heretofore, that the rule established by this Court, in relation to granting new trials in civil cases, for defects of proof, does not apply to criminal cases; but that in such, we will scrutinize and weigh the evidence, and if in our judgment, it preponderate against the verdict, we will grant a new trial.

This scrutiny, then, it becomes our duty now to make in the case under consideration. We do not deem it necessary to enter into an investigation, to show that an illicit intercourse has existed for a long time between the husband of the prisoner and the deceased. It has not been controverted on the part of the State; indeed, it could not be, for the proof of the existence of the

fact, is of such a character, as leaves it almost beyond doubt.

But it becomes highly important to investigate with care—first, the effect which this intercourse, notorious as it was, produced upon the feelings and vindictive passions of the prisoner and the deceased towards one another; and second, the mode and manner in which these feelings and passions were brought to bear, in producing the catastrophe so much to be deplored.

From a careful examination of the proof, upon these two points, we think we shall be enabled to judge whether the verdict of murder in the second degree, which was found by the jury against the prisoner, can be sustained.

Then first, as to the effect produced upon the feelings and vindictive passions of the prisoner and the deceased. The prisoner appears to have been nearly distracted by the infidelity of her husband, and having no positive proof of his guilt, seems to have spent much of her time in anxious watchings about the house of the father of the deceased, for the purpose of obtaining such proof, if practicable.

John F. Sevier, a witness on behalf of the State, says, that in the month of September, previous to the killing, he was passing by the house of the father of the deceased, about two hundred yards from the house, and saw the prisoner in the corner of the fence; she saw him, and jumped over the fence, and went in the direction of the house.

Bedy Mansfield, another witness for the State, says, that about two years before the trial, she was passing by the house of Dougherty, the father of the deceased, and saw the prisoner lying in the weeds, about one hundred and fifty yards from the house; that she saw the prisoner, at another time, stepping about in the woods, near the same distance from the house, and about the same length of time.

Martha Mansfield, another witness for the State, says, that about three years before the trial, she, on two

occasions, saw the prisoner about Dougherty's place, and that she told her she could see her around Dougherty's almost any time.

Orleana Mansfield, a witness for the State, says, she saw the prisoner four times, near the house of Dougherty, concealed; saw the prisoner once in the Maple Swamp, between Dougherty's and Cash's, on the road to Livingston, with an axe; she asked the witness if the deceased was going to town; said she would kill her. This was more than a year before the killing took place. Witness also says, she saw the prisoner once in Dougherty's chimney corner, once at Dougherty's barn, once in a chestnut stump, which was hollow, about two hundred yards from Dougherty's house, and in sight thereof; once in a lot, close to the house, lying in the weeds, and that upon being discovered, she ran. These circumstances were also at periods of more than a year before the killing.

Maria Eldridge, a witness for the State, says, that about eighteen months before the trial, she heard the prisoner say, that if ever the deceased put her hands upon her, she would kill her.

Thompson Cash, a witness for the prisoner, says, she had talked to him about her situation and troubles; that he advised her to bear it, and say nothing; that some time in the summer before the trial, she agreed with him, that, for peace, she would bear it all in the future; "that if they would let her alone at home, she would bear it, and have peace."

Thomas K. Harris, a witness for defendant, says, that some time in the summer before the trial, he had a talk with the prisoner; she spoke of the threats made against her by the deceased; she seemed to be in much distress, and said, she understood her life was to be taken, and she seemed to be alarmed on account of the threats.

Henry Carlisle, a witness for the prisoner, says, he has been with Copeland, the prisoner's husband, for ten

years, and that he never heard her make any threats against the deceased.

This is all the proof in the record, tending to show the state of mind of the prisoner, in relation to the deceased, produced by her wrongs. And what does it amount to? That (as has been observed,) she spent much time in watching the house of the deceased, but for what purpose? It has been argued here, and no doubt, was so before the jury, that she was lying in wait for the purpose of assassinating the deceased. Can it be possible, in the nature of things, that such was her design? Surely not. If she had desired to murder the deceased, there could have been no difficulty in finding her at any time; they lived near together, and no doubt could and did meet often. Where the sense of lying in wait about the fences, in the weeds, in a stump, in the chimney corner, if her design was to assassinate her? These lyings in wait were in open daylight, liable at all times to detection; in fact, they were, as it appears, always detected; and, moreover, how was she to perpetrate the imagined design, when, from all that appears, she was on every occasion but one, unprepared to commit the deed, that is, unarmed. People who lie in wait to commit murder, most generally have fire-arms for the purpose, they being the weapons most effectual for committing clandestine murder. But what was the occasion when she appears to have a deadly weapon? It was, when she was found in the maple swamp with an axe, and enquired if the deceased was going to town, and said that she wanted to kill her—a poor weapon for a woman to use in perpetrating a murder in daylight, and upon a young and vigorous woman, prepared for her defence.

But is it possible, if such had been her design, she would have informed the witness of it? Indeed, from the circumstances we think, that at the time she was found in the swamp she was not watching the deceased, because the swamp was two hundred yards from the house of deceased, and nearer her own; and

because here she met the witness boldly, and upon all other occasions, upon being discovered, she skulked. What was the reason of this? Though compelled by the irresistible impulses of her jealousy, to watch the house of her rival, with a view of detecting her husband, yet she was ashamed of it, and whenever caught, sought to conceal herself; but when found in the swamp, being engaged in a different business, probably getting maple bark for the purpose of dyeing (which will explain satisfactorily how she came to have the axe,) she felt no shame, and did not seek to conceal herself.

Then, in our opinion, all this clandestine watching of the house, where the deceased resided, is no evidence whatever, that she was seeking or desired an opportunity to kill her, but only an opportunity of detecting her husband in his infidelity, and that malice prepense against the deceased is not to be inferred therefrom.

But she said on one occasion, near eighteen months before the affray, that if ever the deceased put her hands upon her, she would kill her; and on another occasion, as we have seen, that she wanted to kill her. This is the only portion of the proof that goes to show direct malice, and it is worth but little in establishing its existence, because the statements were made a long time before the killing took place, and the law will not presume a killing to have been perpetrated upon ancient threats and grudges, if there be anything more immediate, upon which it can be predicated, which, we think, will appear in the further investigation of this case; and because these threats are of a vague and uncertain character, one being based upon a supposed personal injury; the other, a mere ebullition of feeling, the result of unmerited suffering. So much for the effect produced upon the feelings and passions of the prisoner, by the illicit intercourse of her husband and the deceased.

Let us now see what these effects were upon the deceased.

Her rancor against the prisoner appears to have been

very great, induced no doubt by the publicity, which had been given to her intercourse with the prisoner's husband, and mainly, as is fairly to be presumed, by her clamors.

Isaac Williams, a witness for the defence, says he saw the deceased have a knife which she showed him, and heard her say she would beat the prisoner.

Polly Allen, a witness for the defence, says, the deceased offered her a dress, if she would get the prisoner out, that she might kill her, which she refused. She then offered to let her have things in the store, which she refused.

Sally Nelson, a witness for the defence, says the deceased showed her the dress she offered to Polly Allen, to get the prisoner out for her, and said, she would freely have given it.

Sally Allen, a witness for the defence, says the deceased showed her a dress which she had offered to Polly Allen, to get prisoner out, that she might kill her, and said she would have freely given it. She further says, that the deceased came to her house, seemed to be excited, and had been crying. Witness asked her what was the matter? She made no answer, but went through the house into the kitchen, and came out immediately with a flesh fork in her hand, and went towards Copeland's. She further says, that on Wednesday or Thursday before the fatal rencounter between the prisoner and the deceased, the deceased came to her house, and told her she was going to Kentucky, but that she would not leave satisfied, until she gave the prisoner a beating, and that if witness would get her out for her, she would give her a dress. Witness refused; she then offered her a red merino dress, and if that would not do, she would give her ten pounds of coffee.

Isaac Allen, a witness for the defence, says, that some time in the spring before the trial of this case, the deceased came by where he was at work, and said she had been at his house a few days before, that she thought he had a carving knife, but that she could find

nothing but these damned old flesh forks; that her nephew had given her a knife and pistol, and that she did not know what made her such a fool, as to be without them that day; that she had carried them to kill the defendant, and had not been without them before then, in a long time.

Stephen Dillon, a witness for the defence, says, that about a year before the trial the deceased showed him a knife, and said she had it to cut Mary Copeland to pieces.

Thompson Cash, whose testimony has already been adverted to, further says that he heard the deceased say, that she got a pair of flesh-forks from Isaac Allen's, and followed the prisoner, and would have killed her, but was prevented. He also says that the deceased told him, she could make Copeland whip the prisoner, his wife, when she pleased; that some few days afterwards he saw the deceased going to town, and a while after, he saw Copeland coming from town; that they must have met, and that on that night, the prisoner came to his house and said she had been whipped by Copeland, her husband, and driven from home, and asked to be permitted to stay all night.

This is all the material testimony going to show the nature of the feelings and the passions of the deceased towards the prisoner, previous to the rencounter, which terminated in her death. And what does it establish? A degree of hatred and malignity, that one unacquainted with human nature, could scarcely conceive should exist in the breast of a wrong-doer towards the wronged. It establishes beyond a doubt, a determined and wicked propensity to do the prisoner great mischief, at least, if not to murder her, of long continuance, and extending down to the moment of the fatal affray. It shows that she followed her on one occasion with a deadly weapon to kill her, which, she says, she would have done, if she had not been prevented. She regretted on that particular, that she was without weapons, of a more deadly character, which she had been in the habit of carrying

and had not, for a long time before, been without. It shows that such was her thirst for vengeance, that she offered bribes to different persons to get the prisoner out, so that she might beat or kill her. It shows that so strong was the feeling, that she could not leave the State for Kentucky, where she was going, in peace, without its gratification; and last, but not least, it shows that she could even resort to the influence she had obtained over her guilty paramour, to cause him to inflict personal violence on his helpless wife, and drive her from his door in the night time, and compel her to seek refuge at a neighbor's.

What a different state of mind from that of the prisoner—the one infuriated at the publicity which had been given to her guilty intercourse with Copeland, the other distracted at the destruction of her domestic felicity by the infidelity of her husband; the one watching with greedy anxiety for the means of avenging herself upon her adversary, either by killing her, or inflicting upon her great bodily harm; the other watching with patient endurance for the evidence of her husband's guilt; the one breathing upon all occasions, the most horrid threats of vengeance; the other only heard upon two remote occasions, to express a wish to kill her, and a threat that she would, if she ever laid her hands upon her; the one continuing her desire for revenge, and so expressing it, up to the very morning of the fatal rencounter; the other abandoning all such wishes months before, and expressing herself in meekness, willing to bear all things, provided she could be left in peace at home.

It may well be asked, how it is possible, that so different a state of mind could exist, in the injurer, and the injured? It is only to be answered by saying, that such is the strange anomaly of the human character, that it is oftentimes found easier to forgive those who have trespassed against us, than those against whom we have trespassed; and that the proof shows that the prisoner was a member of the Christian Church, in

which she had been taught that it was a holy duty to forgive those who wrong us.

This difference in the feelings of the prisoner and the deceased, which, we are satisfied, the proof warrants us in drawing, must be borne in mind, as it is all important for the proper understanding of the second proposition to be discussed, and the unravelling the somewhat contradictory and confused evidence in relation thereto.

In what manner and mode were the feelings and passions of the prisoner and the deceased brought to bear, in producing the catastrophe which ended in the death of the deceased? The investigation of this proposition includes the transactions of the day on which the deceased was killed.

Thompson Cash, a witness whose testimony has been before referred to, says, that on the Sunday before the fatal rencounter, he saw the prisoner, and that she had promised to go to preaching in the town of Livingston on that day; that she was to come to his house; that to go to Livingston she was bound to go the way she did, or go the main road, along by Dougherty's, and says, the way the prisoner went, is further than to have gone the road immediately by Dougherty's.

Ann Cash, a witness for the defence, says, that the prisoner was to come to their house on the day of the fight, to go to Livingston to preaching.

Ferdinand Dougherty, a witness for the prosecution, says, he was at old man Dougherty's when the affair took place, was standing in the yard at the woodpile with Alexander and Samuel Farris, that he saw the prisoner coming round the fence about the Celina road, that she went across towards Stuart's, that she was not in the road, but going along in the woods—that Samuel Farris halloed out to the deceased, saying, "Aunt Ruth, yonder goes old Mary Copeland;" Ruth was in the kitchen; she came out and started across the yard, and then turned down in the direction to intercept the prisoner. Prisoner went like she was going to Stuart's fence,

towards Cash's—deceased went on, did not see what she did with the stick—when deceased got within about five yards of the prisoner's path, she stopped. Prisoner went on, when she got to a log about twenty steps from where they fought, she made a little halt, then went fast, until she got in about five steps of the deceased, then sprang across at her—they clinched, and he saw a grabbing of hands, prisoner got under the deceased's right arm, and the deceased had her right arm round prisoner's neck, and the prisoner struck like she was stabbing with her right hand; says the deceased had no stick, that the distance from the house of Dougherty, from whence he witnessed the affray, to the place where they fought, is one hundred and sixty yards, open woods, a few trees, and no undergrowth.

Alexander Farris, a witness for the prosecution, says, on the Monday morning the fight took place, he was in the yard on the woodpile, with Ferdinand and Samuel Farris, that he saw the prisoner going round towards Stuart's, that his Aunt Ruth came out of the kitchen, went by the crib, got a stick, and started over in the direction to intercept the prisoner, that the prisoner went on like she was going towards Stuart's gate, got near the gate, and turned rather back, and took down Stuart's fence, in the direction of Thompson Cash's—that the deceased went on, and took a path that intersects prisoner's path, between Stuart's and Cash's—that when deceased got within five steps of prisoner's path she stopped, and the prisoner, when she got to a log, in about twenty steps of the junction of the paths, made a small halt, and then went fast, until she got opposite the deceased, and then sprang across at her; saw their hands grabbing, then saw prisoner get deceased with her left arm under her right arm, deceased's right arm around prisoner's neck, and then saw the prisoner strike like she was stabbing; heard a scream, and the deceased fell; says that the distance from where he stood to the place of the rencounter, was one hundred and sixty yards, open woods. and no undergrowth—that he saw no stick in the

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nands of the deceased, that he did not see what the deceased did with the stick she had taken with her from the crib.

Samuel Farris, a witness for the State, says, he was at his grandfather's on the Sunday morning the fight took place; that he saw the prisoner going round past his grandfather's, like she was going to Stuart's; he said, "Aunt Ruth, yonder goes old Mrs. Copeland," thinks she did not hear him; she came out of the kitchen, she went by the crib, and he saw her have a stick, going in the direction to intercept the prisoner. Her father told her to come back; she looked back but did not return. When the deceased went through the yard, prisoner had passed Stuart's gate, and was going down Stuart's fence towards Thompson Cash's. Deceased went on through the yard out at the place where the fence was down, crossed the road, and took a path intersecting the prisoner's path, between Stuart's and Cash's; that the deceased and prisoner met between the junction of the two paths, that they both kept right on, and met; that, as they came near, prisoner increased her gait; that, when they met, he saw a grabbing of hands; that the prisoner got her left arm round the deceased's waist, deceased got her right arm round prisoner's neck, who then struck like she was stabbing; he heard a scream; the deceased fell.

Polly Farris, a witness for the State, and a sister of the deceased, says, she was at her father's on the Sunday morning the fight took place—that she ran down to the place where it occurred, and found her sister stabbed in several places, of which she very shortly died.

Matilda Dougherty, a sister of the deceased, and a witness for the State, proves in substance, the same as the foregoing witnesses.

Alexander Dougherty, the father of the deceased, says, he did not see the fight; saw Ruth pass from the kitchen by the house door, and go in the direction of the crib, then saw her go through the orchard, towards where the fence was down, next the road, with a stick;

called to her to come back; she made him no answer. He says, that the stick produced, which was a large hickory, about three and a half feet long, and three and one-half inches or four in circumference, looks very much like, and it may be, one of the sticks he cut and put in the fence about or near his crib, being in the same direction deceased went, before he saw her with a stick; he further says, that the deceased was a woman of uncommon high temper, but a very affectionate child.

This constitutes the proof of the *corpus delicti*, on the part of the State.

On the part of the defence:

Wyatt Haywood says, he heard Ferdinand Dougherty say he had done his best to stop the deceased, but she would not—she said she would have satisfaction. Further says, that after the affray, he examined the prisoner, and saw a cut on her head and a bruise on her wrist.

William Dougherty, a nephew of the deceased, says, he found and picked up the stick, which was produced on the trial, and which is alluded to in Alexander Dougherty's testimony, near where the fight took place; that he went after his Aunt Ruth's shoes, that he found one of them near her path, the other between the junction of the two paths, nearest the defendant's path; and that he found the stick between the shoes, close to the shoe that was nearest the defendant's path.

Thompson Cash says, that he saw Alexander Farris on the road to Livingston, a very short time after the killing, and that he told him that his Aunt Ruth went out and commenced upon the prisoner with a stick, and, that the prisoner had stabbed and killed her.

Rachel Orton says, that she saw the prisoner soon after the homicide; that she had a large knot on the top of her head, as thick as her wrist; it was a long knot, seemed to have been made with a stick, and running across the head; defendant had a bruise also on her wrist; prisoner stayed all night with her; next morning

there were green streaks down the side of her head, and she complained that she could not turn her head.

Thomas R. Harris says, that the deceased was the largest woman, also the youngest; says also, that the defendant had a knot on her head, running cross it, as large as a hen's egg, and that her wrist was bruised.

Jackson Thompson says, that he was at the place where the fight was said to have taken place; that old man Dougherty was standing in or near the path of the prisoner, some seven or eight steps above the junction of the paths, that he pointed his stick and said, there Ruth lost her life. Witness looked and saw a drop of blood on a leaf; it was picked up by a boy. He further says, that Alexander Farris was present, and did not contradict it. This was soon after the killing, and before old man Dougherty left the ground.

Harrison Copeland says, that he heard the examination before the Justice of the Peace, and that Ferdinand Dougherty swore that Ruth and the prisoner came together.

Now it is obvious that the question, as to whether this homicide be murder, manslaughter or self-defence, depends materially upon the solution of the difficulty arising from the proof, as to the point at which the prisoner and the deceased met, and as to which commenced the assault.

Inasmuch as Mrs. Copeland, the prisoner, was going her own road, and in a laudable pursuit, if she did nothing more, in going that road, than defending herself against a violent assault from a hickory stick, three and one half feet long, and from three and one half to four inches in circumference, the killing in our opinion was homicide *se defendendo*. If she, upon meeting her adversary unexpectedly, who had intercepted her upon her lawful road, and in her lawful pursuit, accepted the fight, when she might have avoided it by passing on, the provocation being sudden and unexpected, the law will not presume it to be on the old grudge, but upon the first insult, by stopping her on her way, and it would be manslaughter.

If the deceased upon approaching the prisoner's path, repented of her intention, or became irresolute and stopped, leaving the prisoner full and unobstructed right and liberty to pass, and she brought on the attack with design to kill her, it would be murder in the first or second degree, according to the circumstances of the case; that is, if the killing was the result of the old grudge, and a previously premeditated malice, it would be murder in the first degree; if it were the result of malice suddenly produced by the sight of her rival, without previous premeditation, it would be murder in the second degree.

Then, in the first place, where did they meet? The proof shows most conclusively, that the prisoner was passing down a path by Stuart's and Cash's fence; that the deceased, upon being informed of the fact, left her father's residence, and after arming herself with a deadly weapon, took a diagonal path intercepting that of the defendant, and with the view of intercepting her; what she designed by that interception, the testimony which we have heretofore examined, fully explains. It is unnecessary to repeat it; it was as she avowed again and again, to kill her, or to beat her, before she left for Kentucky. That this design was well known to her friends, is obvious from the fact that they informed her that the prisoner was passing; the more discreet portion of her friends, to-wit, her father and her sister, requested her to return; to this prudent advice she turned a deaf ear. Going, then, upon such an errand, and with such motives, is it to be conceived, that she would suddenly change her fixed intentions and stop short of the point where her long-conceived vengeance was to be satiated? Upon what motive would she do this? Had her heart softened? Had she repented of her evil designs? No one pretends to this, and yet some of the witnesses say she did stop five steps from the point where the two paths intersected, and that the prisoner brought on the attack. Is this probable? We think not.

Because in the first place, we think that the proof

shows, that the prisoner was, and had been for a considerable time before, anxious to avoid any conflict with her; from the period of time at which the witness, Cash, had advised her to bear her troubles with patience, and she had promised she would, we hear no more of her watching the house of the deceased; we hear no more of her threats or complaints. On the morning of the catastrophe, in going to join her neighbor, for the purpose of attending divine worship, instead of taking the direct road, which would have led her by the house of the deceased, she, obviously with the design to avoid collision, took a circuitous path. She had been heard to express fears that she was to be assassinated by the deceased. The deceased was a stronger and a younger woman. Can it then be possible, that she would not have passed in peace, if she had been permitted to do so?

2. The character of the deceased; her embittered feelings towards the prisoner; the great length of time she had been seeking an opportunity to do her mischief; the fact that she was going to Kentucky immediately, the consequence of which would be, that if she missed the then opportunity, it would probably be gone forever, preclude the idea of her having abandoned her intention. But in answer to this, it is said she stopped, because she saw the knife in the hands of the prisoner. This is not at all probable, if possible, because the proof shows, that she came upon the path of the prisoner considerably in advance of her, and that after the deceased had stopped, the prisoner continued to advance until she got within about twenty steps of deceased, and then made a pause. Is it, then, probable, that the deceased, at the distance she must have been from the prisoner when she stopped, could have seen a small knife in her hands? We think not.

3. The stick which the deceased carried with her, was found near the path of the prisoner, as also one of her shoes.

4. The father of the deceased pointed out a place on the path of the prisoner, where he said his daughter had been killed, and a leaf with a drop of blood on it was there found; and this immediately after the homicide.

5. The prisoner had a severe contusion on her head, and one on her wrist; these blows must have been given before the parties clinched, and before the deceased was stabbed. All these things tend to show most satisfactorily, that the deceased did not stop until she arrived at the point of the intersection of the two paths, where she awaited the arrival of the prisoner—and that the prisoner at the distance of twenty steps paused, not knowing certainly whether to advance or recede, but eventually concluded to advance and risk the consequences, with the determination to protect herself by slaying her adversary, if necessary—and that her adversary commenced the assault by striking her with the stick.

But then there is the testimony of Ferdinand Dougherty and Alexander Farris, which states that the deceased did stop five steps short of the prisoner's path, and that the prisoner did make the assault.

We think these witnesses are mistaken, because,

1st. The distance from the place where they stood, and the place where the rencounter took place, was too great for them to judge with accuracy whether the deceased stopped short of the intersection of the paths, or not.

2d. It is obvious that they did not see the commencement of the affray; no one can doubt that the deceased struck the prisoner at least two blows, with the stick, before they closed, when deceased, probably discovering the knife in the hands of the prisoner, dropped her stick with the view of taking the knife from her; this was the time the grabbing of hands spoken of by the witnesses, took place. Yet Ferdinand Dougherty says, the deceased had no stick; and

Alexander Farris says, that, although the deceased started with a stick, yet, when he first saw the struggle, which he describes as a grabbing of hands, he saw no stick, and that he did not know what the deceased did with the stick she took from the crib.

3d. Samuel Farris, who also witnessed the fight from the same place with the other two witnesses, says, that the deceased and prisoner met between the junction of the two paths; that they both kept on and met.

4th. Thompson Cash says, that on the same day the homicide was perpetrated, Alexander Farris told him that his Aunt Ruth went out and commenced upon the prisoner with a stick, and that the prisoner had killed her.

These reasons satisfy us, that the witnesses, Ferdinand Dougherty and Alexander Farris, did not, as we have said, see the commencement of the fight, and that they are mistaken in supposing that the deceased stopped five steps short of the intersection of the paths, and that the prisoner brought on the attack.

This, then, being so, we are fairly warranted in saying that the deceased went upon the path of the prisoner, with the determination to inflict severe punishment upon her; that she stopped at the point of intersection, and awaited her coming; that the prisoner kept on her way, determined to resist and protect herself, be the consequences what they might. That the deceased commenced the combat, and that the prisoner killed her. This is not murder in the first or second degree, and must be homicide in self-defence, or at most, manslaughter.

We, therefore, reverse the judgment of the Circuit Court, and give the prisoner a new trial.

Judgment reversed.

NOTE.—It is to be observed, that so far as regards the facts immediately attending the killing, this case is somewhat similar to Selfridge's case, *ante*. In this case as in that, the prisoner was going her lawful way, but secretly armed with a deadly weapon. In each case, the prisoner was sud-

denly intercepted and assaulted by a person of superior physical strength. The weapon with which the assault was made, was in both cases of a similar character.

But the cases depart from each other in two particulars: First, Selfridge was morally in the wrong; though legally not so much so as to restrict his right of defence. Mrs. Copeland, on the other hand, had been greatly wronged for a number of years, by reason of a notorious adulterous intercourse carried on between her husband and the deceased. Neither of these facts, however, could have any direct legal influence upon the result of the trial.

Secondly, there is a wide departure in the law of the two cases, so far as regards the question of the necessity of retreating before killing. In Selfridge's trial, the real stress of the case was held to have been whether the defendant could not have avoided the danger by retreating or throwing himself into the arms of his friends. But in Copeland's case, no such requirement is put upon the prisoner—nothing of the kind is intimated. Indeed, it is said that if Mrs. Copeland accepted the fight when she might have avoided it by passing on, the provocation being sudden, she would be guilty of manslaughter; but this clearly has no reference to the doctrine of "retreating to the wall." Upon the latter subject, see the note to Selfridge's case.

THE PEOPLE v. JOHN DOE.

[1 MICH., 451.]

Supreme Court of Michigan, January Term, 1850.

CHARLES W. WHIPPLE, *Chief Justice.*

WARNER WING,	} <i>Justices.</i>
GEORGE MILES,	
SANFORD M. GREEN,	
EDWARD MUNDY,	

KILLING IN SELF-DEFENCE.—SELFRIDGE'S CASE APPROVED.

1. The degree of force or the means which a person may use in defending his person or personal liberty, must depend upon circumstances. To justify taking the life of another, it must appear that his safety required him to do so.

2. The law relative to taking life in self-defence, as laid down by Mr. Justice PARKER in Selfridge's case, [*ante*, pp. 16, 17,] approved.

Indictment for murder in the first degree. The name of the prisoner being unknown to the Grand Jury, he was indicted by a personal description, and the fictitious name of John Doe.

He pleaded not guilty, but was convicted of murder in the second degree. There is no statement of facts in the original report; but it may be gathered from the opinion, that the prisoner had stolen a span of horses in Indiana, and had escaped into Michigan, whither he was pursued by a constable. As soon as he saw the constable, he recognized him, and knew his business, and betook himself to flight; and being pursued by the constable and his posse, killed one of them named Fanning; but it does not appear whether Fanning was the constable or one of the posse.

Lathrop, Attorney-General, for the People; *Chipman*, for defendant.

Extract from opinion of the Court, delivered by GREEN, J.:—The charge of the Court upon the specific instructions, which the prisoner's counsel requested might be given by the Court, was as favorable to the prisoner as he had a right to require. The Court instructed the jury, "that a person was authorized to defend his person or personal liberty, to the extent claimed by the counsel for the prisoner; but that the degree of force, or the means to be employed in protecting his person or personal liberty, must depend upon circumstances; that to justify a person in taking the life of another, it must appear that his safety required him to do so; that in the case before the Court, there was no evidence that the person or personal liberty of the prisoner had been assailed by the deceased when the wounds were inflicted upon him by the prisoner, which it is admitted by the prisoner, proved fatal."

In the case of the *Commonwealth v. Selfridge*, (Selfridge's Trial, p. 160),* the principles of law relative to destroying life in self-defence, are very clearly and

* *Ante* p. 16; see also note to Selfridge's case.

perspicuously laid down by Mr. Justice Parker. He says :

First. That a man who, in the lawful pursuit of his business, is attacked by another, under circumstances which denote an intention to take away his life, or do him some enormous bodily harm, may lawfully kill the assailant, provided he use all the means in his power, otherwise, to save his life or prevent the intended harm ; such as retreating as far as he can, or disabling his adversary without killing him, if it be in his power.

Secondly. When the attack upon him is so sudden, fierce and violent, that a retreat would not diminish but increase his danger, he may instantly kill his adversary without retreating at all.

Thirdly. When, from the nature of the attack, there is reasonable ground to believe that there is a design to destroy his life, or commit any felony upon his person, the killing of the assailant will be excusable homicide, although it should afterwards appear that no felony was intended.

By comparing this language, which expresses the well-established and recognized doctrine upon this subject, with that used by the Chief Justice in the case under consideration, it is very apparent that the prisoner had nothing to complain of in that respect.

Judgment affirmed.

THE PEOPLE v. SULLIVAN.

[3 SELDEN, 396.]

*New York Court of Appeals, October Term, 1852.*CHARLES H. RUGGLES, *Chief Judge.*

ADDISON GARDNER,	} <i>Judges.</i>
FREEBORN G. JEWETT,	
ALEXANDER S. JOHNSON,	

JOHN W. EDMONDS,	} <i>Justices of the Supreme Court, and ex-officio Judges of the Court of Appeals, from January, 1852, to January, 1853.</i>
MALBONE WATSON,	
PHILO GRIDLEY,	
HENRY WELLES,	

MURDER.—SLAYER MUST ENDEAVOR TO AVOID NECESSITY.—ACTING UPON APPEARANCES.—COOLING TIME.

1. The intentional killing of a human being without provocation and not in sudden combat, is murder, although done in the heat of passion.

2. Where one believes himself about to be attacked by another, and to receive great bodily injury, it is his duty to avoid the attack if in his power to do so, and the right of attack for the purpose of defence does not arise, until he has done every thing in his power to avoid its necessity. [Acc. Shippey's case, *post.* Contra, Bohannon's case, *post.*]

3. Where the judge charged, that if the jury believed that the deceased returned up stairs with intention to renew the fight, and that the defendant had reasonable ground under the evidence, to believe that the deceased designed to do him some great personal injury, and that there was imminent danger of *such design* [instead of *such apparent design*?] being accomplished, then it was not murder, *it was held*, that this instruction was not erroneous, when tested by the rule in *Shorter's case*, *post.*, that a reasonable appearance of danger of death, etc., will excuse the slayer. [But see Maher's case, *post* and *note.*]

4. Where, after a mutual combat has been for the moment terminated, and a fatal blow is then struck, the question to be determined is, whether there had been sufficient time for the excited passion of the prisoner to cool, and not whether in point of fact, he did not remain in a state of anger.

The defendant was convicted of the murder of Edward Smith, at a Court of Oyer and Terminer, held in the city of New York, Edmonds, J., presiding, in September, 1851.

The evidence disclosed the following facts. The prisoner with his family, consisting of a wife and two small children, and a cousin, Mary Moran, occupied a back room in the second story of the house, No 4 Cliff Street, in the city of New York. The rest of the house was occupied as a boarding house by Mrs. Ferris. The deceased was one of her boarders, and occupied the front room in the third story, the stairs to which passed directly by the door of the room occupied, and within four feet of it. The front room in the first story was occupied as the dining room of the boarding house. The stairs from the first to the second story terminated upon a narrow landing, within six or eight feet of the prisoner's door.

On Sunday, the 10th day of August, 1851, at about one o'clock in the afternoon, while Mrs. Ferris and some of her boarders were at dinner, an uproar and noise, as of the breaking of crockery, was heard in the prisoner's room. It was caused by his becoming angry at something said by his wife while his family were at dinner, when he commenced breaking the dishes upon the table, and drove her from the room with violence, and compelled Mary Moran, with one of the children, to seek refuge in another room. Mrs. Ferris went up to the prisoner's room to endeavor to stop his violence, and upon entering it, was struck by him a violent blow in the face and compelled to leave. During this time the deceased was in his own room, dressing for dinner. As he went down stairs, he stopped at the prisoner's door, which was open, placing his back against the wall and his feet across the door, and having his arms folded, and remarked to the prisoner: "It is a shame to be making such a row on the Sabbath day; you have a sober wife, and you ought not to be going on in such a way." The prisoner replied: "I have a right to do as I please in my own place." The deceased then turned to go down stairs, saying, "Now, Sullivan, don't let me see you break any more." Sullivan said he would, and immediately commenced breaking dishes again. The

deceased then went into the room, and a scuffle ensued, the prisoner seizing the deceased by the throat, and he grasping the prisoner by the hair. In the scuffle both fell upon the floor, when Mrs. Sullivan and Mary Moran came to the aid of the prisoner. One of the witnesses found the prisoner and deceased lying on the floor, and assisted in breaking the hold of the prisoner, when the deceased got up, still held by Mrs. Sullivan and Mary Moran. He tried to get away, and got out of the door, and while so doing the prisoner struck him a blow, at which he became somewhat excited, and struck back. He then went down stairs, having his shirt, which had been torn off in the encounter, under his arm. On reaching the foot of the stairs, he handed his shirt to a person standing there, and turned as if to go back, when he was cautioned by some one, with a view of deterring him, but without the idea that the prisoner was armed, "Look out for a knife." He, however, went up stairs, the prisoner at the same time standing on the landing and looking over the railing. As he reached the last step but one, he suddenly turned and said, "I am stabbed! I am murdered! I am dying!" and immediately came down stairs, covered with blood. He was taken into the dining room, and died within half an hour. Upon a *post mortem* examination, three wounds, inflicted by a sharp-pointed instrument, were found on his body; one in the left shoulder half an inch long and four inches deep, penetrating to the bone; another in the groin two inches in length and four inches deep, which severed a branch of the femoral artery; and the third, a slight wound, in the side. There were other circumstances to show that the wounds were received from the prisoner.

The counsel for the prisoner requested the Court to charge as follows:

If the jury believe that Smith returned up stairs to renew the fight, and Sullivan believed he intended to do him great bodily injury, he had a right to defend himself even unto death, and it is not murder.

If the jury believe that Smith, having had the fight

with Sullivan, and by his conduct and blows aroused and excited the passions of the prisoner, and then returned, thereby keeping up the excited passions of the prisoner, and, under such excitement, the prisoner stabbed the deceased, it is not murder.

If the jury believe that the prisoner in the heat of passion caused the death of the deceased, it is not murder.

The judge refused to charge as requested; but in relation thereto, charged: that if the jury believed that Smith returned up-stairs with intention to renew the fight, and that Sullivan had reasonable ground, under the evidence, to believe that Smith designed to do him some great personal injury, and that there was imminent danger of such design being accomplished, then it was not murder.

That if at the time of killing, Sullivan struck the blow with intent to kill, it was murder, unless justified or excused under the evidence in the case, of which the jury were the judges; and that the mere fact of his being in a passion was not in itself sufficient to excuse or justify the act; and that if the jury believed that the killing was produced by the prisoner, with an intention to kill, though that intention was formed at the instant of striking the fatal blow, it was murder; that the jury might infer such intention from the circumstances of the case, and, among other things, from the nature of the weapon used and the wounds given by it.

Exceptions were taken, and the cause removed to the Supreme Court by writ of error. It was there heard at a general term held in the city of New York in February, 1852, and the judgment of the Oyer and Terminer reversed, and a new trial ordered. From the judgment of the Supreme Court it was brought here by writ of error.

N. B. Blunt, for the plaintiff in error; *R. H. Morris*, for the prisoner.

JOHNSON, J., delivered the opinion of the Court:

The question as to the dismissal of the writ of error,

and the question upon the bill of exceptions, relating to the charge of the judge, that if the killing was produced by the defendant with an intention to kill, though that intention was formed at the instant of striking the fatal blow, it was murder, and that the jury might infer such intention from the circumstances of the case, and, among other things, from the nature of the weapons used and the wounds given by it, have already been disposed of in the case of the *People v. Clark*.*

There are some other questions in the case, but they are so obviously against the prisoner, that, except in a capital case, it would be scarcely requisite to notice them in detail. The defendant's counsel requested the Court to charge the jury that if they believed that Smith returned up-stairs to renew the fight, and Sullivan believed that he intended to do him great bodily injury, he had a right to defend himself even unto death, and it is not murder. This the Court properly refused to charge; for if Sullivan believed himself about to be attacked, as supposed by the request, his duty was to avoid the attack, if in his power to do so; and the right to defend himself would not arise, until he had done everything in his power to avoid the necessity of defending himself. The Court was further requested to charge the jury that if they believed the prisoner in the heat of passion caused the death of the deceased, it is not murder.

This was properly refused. The designed killing of another without provocation, and not in sudden combat, is certainly none the less murder because the perpetrator of the crime is in a state of passion.

The Court was also requested to charge that if the jury believed that Smith, having had the fight with Sullivan, and by his conduct and blows aroused and excited

*3 Selden 385. This case holds that to constitute the crime of murder, the degree of deliberation is not different under the revised statutes from that under the common law; and that it makes no difference whether the design be formed at the instant of striking the fatal blow or months before. It is enough that the intention precedes the act, although that follows instantly.

the passions of the prisoner, and then returned, thereby keeping up the excited passions of the prisoner, and under such excitement the prisoner stabbed the deceased, it is not murder. This request was erroneous, and was properly rejected. Where after mutual combat, a question arises whether there has been time for excited passions to subside, the question always takes this form; whether there had been sufficient time to cool, and not whether, in point of fact, the defendant did remain in a state of anger. The request presented simply the question whether the defendant continued in anger up to the time of killing.

After the several requests which have been noticed, the Court charged the jury upon the matters to which they related, as follows: If they believe that Smith returned up-stairs with intention to renew the fight, and that Sullivan had a reasonable ground, under the evidence, to believe that Smith designed to do him some great personal injury, and that there was imminent danger of such design being accomplished, then it was not murder. It was contended, on the argument, that this charge required the jury to find whether imminent danger actually existed, and not merely whether Sullivan had reasonable ground to believe that it existed. If this construction of the charge was correct, the case of *Shorter v. the People*, [2 Comst. 197.] would show it to be erroneous; but we do not so understand the charge. As we read it, the jury were told that if Sullivan had reasonable ground to believe, both, that Smith designed to do him some great bodily injury, and that there was imminent danger of the accomplishment of such design, it was murder. This was the proper mode of submitting the question.^b

The judgment of the Supreme Court is erroneous and must be reversed, and there must be judgment as in the case against Clark.

Judgment of the Supreme Court reversed.

^bSee *Shorter's* case and note, *post*.

HARRISON v. THE STATE.

[24 ALA., 67.]

*Supreme Court of Alabama, January Term, 1854.*WILLIAM P. CHILTON, *Chief Justice.*DAVID G. LIGON,
GEORGE GOLDTHWAITE, } *Associate Justices.***KILLING WITHOUT WAITING FOR OVERT ACT.—KILLING TRESPASSER.—
INSTRUCTIONS ON SELF-DEFENCE IRRELEVANT, WHEN.**

1. In a case of homicide, to justify the killing, it is not sufficient that the deceased had the means at hand to effect a deadly purpose, but he must have indicated by some act or demonstration, at the time of the killing, a present intention to carry out such purpose, thereby inducing a reasonable belief on the part of the slayer, that it was necessary to deprive him of life to save his own; and if the evidence shows no such act or demonstration, no question on the law of self-defence arises. [See note b.]

2. If one man deliberately kill another to prevent a mere trespass upon property, whether such trespass could or could not be otherwise prevented, it is murder. [Acc. Morgan's case, *post*; Drew's case, *post*; McDaniel's case, 8 Miss., 401; Lambeth's case, 23 Miss., 322; People v. Horton, 4 Mich., 67.]

3. Circumstances where a charge on the law of self-defence was calculated to mislead the jury.

Robert R. Harrison, the plaintiff in error, was indicted for the murder of one George W. Gilbert; was tried and found guilty, and sentenced to the penitentiary for the term of his natural life.

A bill of exceptions was sealed at the trial, by which it appears that the deceased and Harrison were brothers-in-law; that some time previous to the killing, a ditch had been dug by the deceased, some four feet deep, which drained a pond of water that otherwise accumulated on the land both of Harrison and the deceased, their farms lying contiguous; said ditch allowing the water to flow off through the land of Harrison to the woods below, and had been kept open for that purpose about ten years, that on the day previous to the fatal occurrence there came a heavy rain, and Harrison was seen

the same (Sunday) evening, at work on the edge of the ditch, and the next day it was ascertained to be stopped up by dirt being thrown into it; the result was, the corn of Gilbert, growing in the field, was overflowed with water, as much as from one to four acres; that Gilbert sent his two small boys with hoes to open the ditch, so as to let the water pass off; that they proceeded to where it was filled up in the field of Harrison, and returned in a short time and reported that it was filled up to such an extent they could not open it; that the deceased then requested his wife to go and assist the boys, saying, at the same time, "that he did not wish to have any fuss or difficulty with Harrison"; that Mrs. Gilbert and the lads returned to the place and commenced removing the dirt, when Harrison, who is the brother of Mrs. Gilbert, came, and began with a hoe to fill up the ditch, sprang across it, and struck one of the boys two slight blows with his hoe, one of the blows being upon the face; that the boy then started back to the house, and Harrison said, as he started, "if it is for guns you are going, I will go and get mine," and immediately ran to his house, about one hundred and fifty yards distant, and came back with his gun, saying to Mrs. Gilbert, "If Gilbert comes here I will kill him"; that the boy who went to the house informed his father, the deceased, that Harrison was at the ditch and would not let them open it; Gilbert, who could see the parties from his house, replied, "It will not do to let the corn spoil, and we must go back and let off the water." He then took his gun down from over the door, and the little boy took his gun, and they proceeded in an ordinary gait to the ditch. Gilbert came up within a few feet of Harrison, who was on the opposite side of the ditch, and with his gun on his shoulder stopped, looking at his wife, who was near by, and seeming about to speak to her, when Harrison discharged his gun at him, which taking effect, he instantly died. Harrison immediately started to run to his house, saying, "If you are not dead now, damn you, I will come back and kill you." The evidence further tended

to show, that the opening of the ditch was a benefit to Harrison as well as to the deceased.

The Court charged the jury as follows: "If when Gilbert came armed to the ditch, Harrison had reason to believe that Gilbert was about to shoot him, and that Harrison's only safety was in taking the first shot, then the killing was in self-defence; but that this belief of Harrison's must not rest on his fears only; it must be a well-founded belief of a danger to his life, or of some great bodily harm, immediately at that time pressing on him."

The defendant's counsel asked the Court to charge the jury, "that, if Harrison was in possession of the land, and had closed up the ditch, Gilbert had no right to use force in opening it, although it might cause his land to overflow"; also, "that if Harrison had a well-founded belief that Gilbert came into his field with his gun with the intention of doing him a bodily harm, then Harrison was not bound to wait for Gilbert to execute his intentions, but might act in his own defence." These charges the Court refused to give.

The charge given, and the refusal to charge as requested, are now assigned for error

Williamson, for the plaintiff in error; *M. A. Baldwin*, Attorney-General, *contra*.

CHILTON, Ch. J., delivered the opinion of the Court.

The charge which was given, when considered with reference to the facts set out in the bill of exceptions, was more favorable to the defendant than the law would authorize. There was no evidence that Gilbert was about to shoot Harrison, when the latter killed him; on the contrary, he was standing with his gun on his shoulder, and about speaking to his wife, when he was shot down, and this shooting was carrying out a threat made to the wife of Gilbert by Harrison, that he would kill him if he came there.

The law of self-defence, so far as the proof set out in record shows the transaction, had nothing whatever to

do with the case. Harrison in the first instance, brought on the difficulty by a most unneighborly and malicious act in stopping up the ditch, thus injuring himself in order to overflow the growing crop of the deceased. When it was attempted to be opened, he was there, throwing in the dirt, as the wife and children were engaged throwing it out; he inflicts personal violence upon one of the children with his hoe, and when the child left, he flies to his gun; and without necessity, and in the absence of any attempt or demonstration of an intention to injure him, on the part of the deceased, other than having his gun upon his shoulder, he deliberately shoots him down while in the act of speaking to his wife. It was calculated to mislead the jury to charge on the law of self-defence under such circumstances, for they might well have inferred that the Court would not give a charge which was abstract, and hence, that merely having a gun upon his shoulder, without more, put the life of the prisoner in imminent peril, justifying him in what he did. Such is not the law.

It was correctly said by Ruffin, C. J., in *The State v. William Scott*,^a 4 Iredell's Law Rep. 409, that "the belief that a person designs to kill me, will not prevent my killing him from being murder, unless he is making some attempt to execute his design, or, at least, is in an apparent situation to do so, and thereby induces me reasonably to think that he intends to do it immediately." The "situation" spoken of, is not that he has the means at hand for effecting a deadly purpose, but that, by some act or demonstration, he indicates, at the time of the killing a present intention to carry out such purpose, thereby inducing a reasonable belief, on the part of the slayer, that it is necessary to deprive him

^a *Post*.

^b For the same doctrine, see *Lander's case*, *post*; *Creek's case*, *post*; *Dyson's case*, *post*; *Cotton's case*, *post*; *Rippy's case*, *post*; *Williams' case*, *post*; *Evans' case*, *post*; and others. Contra, *Grainger's case*, *post*; *Phillips' case*, *post*; *Carico's case*, *post*; *Bohannon's case*, *post*, and *Young's case*, *post*.

of life to save his own. *Pritchett v. The State*, 22 Ala., 39;^c *Wharton's Crim. Law*, 260.^d

It is manifest from what we have said, that there was no error in refusing the charges asked by the counsel for the defendant in the Court below.

Whether Gilbert had or had not the right to use force in opening the ditch, was a question which did not arise upon the proof. It is perfectly clear that the prisoner had no right to take his life to prevent his opening it. *Russell on Crimes*, 663. If one man deliberately kill another to prevent a mere trespass upon property, whether such trespass could or could not be otherwise prevented, it is murder. *State v. Morgan*,^e 3 Iredell's Law Rep, 186; *Commonwealth v. Drew*, 4 Mass. 391; *Wharton's Crim. Law*, 258.^f

As to the last charge asked and refused, it is fully covered by what we have said as respects the charge given.

There is no error in the record, and the sentence of conviction is affirmed.

Judgment affirmed.

STATE v. BAKER.

[1 JONES' LAW, 267.]

Supreme Court of North Carolina, June Term, 1854.

FREDERICK NASH, *Chief Justice.*

RICHARD M. PEARSON, } *Judges.*
WILLIAM H. BATTLE, }

LAWFUL RESISTANCE—IMMINENCE OF THE DANGER.

If, after words of anger, the slayer took up an axe, and approached the deceased with a present purpose and design to take away his life, or to do

^c *Post.* ^d § 1026, 5th Edition. ^e *Post.* ^f 5th Edition § 1025.

him some great bodily harm, and the deceased had sufficient grounds to believe that such was the intention of the assailant, he had a right to strike in self-defence, although the assailant was not yet in striking distance, and such striking by the deceased will not amount to a legal provocation to mitigate the killing to manslaughter. [See note, *sub fin.*; Hinton's case, *post*, and note.]

The case is fully set forth in the opinion of the Court.

NASH, Ch. J., delivered the opinion of the Court.

The correctness of the opinion delivered on the trial of the case below, rests upon the testimony which was before the jury. It is necessary, therefore, to examine it, in order to estimate its bearing upon the law. The blow which was received by the deceased, was inflicted by the prisoner, about eight o'clock of the night of 26th December, 1853, and the death ensued on the 15th or 16th of January, 1854. George W. Gibson testified that he was at Hays', about half a mile from Prince's shop, the night that the affray took place, and that between six and eight o'clock, the deceased and prisoner had a fight. They were parted, and Hays took him into his house and fastened the door; and very shortly thereafter, some one knocked at the door and inquired for Edwards, the deceased. The latter then went out at the back door, and went off. The witness did not know who it was knocked at the door.

Currie, a witness for the prosecution, stated, that about eight o'clock of the night of the 26th December, 1853, he went to a store, about half a mile from Rockfish village, where he found Prince, the keeper of the store, and the deceased. In a short time the prisoner came up with his axe upon his shoulder, and sat it down a little way apart, and accosted them in the usual way. In a short time, the deceased, alluding to a fight on that evening, between him and the prisoner, observed, "Baker, I am sorry I had to hurt you this evening, but I could not help it. I had to protect myself." The prisoner observed, "It was too late to talk that way now,—when a man whipped him when he was drunk, he would not

stay beat." The prisoner and the deceased talked the matter over in a friendly way, walked off a short distance, and came back, apparently friendly. The prisoner sat down on a chair, and the deceased on the ground near him, and to the fire, which was burning out of doors. Baker asked for some liquor, which was brought out by Prince. The prisoner and the deceased began again to quarrel; angry words were passed between them, and deceased observed "he would settle it when Baker got sober;" when Baker said, "No, we will settle it now." The witness was asked by the prisoner to drink some of the liquor, and upon his refusal, threw it in the fire, and walked off some eight or nine paces to where his axe was, picked it up, and advanced with it in a half-drawn position towards the fire, where the deceased was still sitting. The latter said "Are you going to kill me with that axe?" The prisoner made no reply, but still advanced with the axe in the same position, elevated, and the handle and blade held out in front of his body, but not drawn back. The deceased then said, "Stand off" (the prisoner still advancing); "if you come any nearer I will knock you down;" and took from the fire a burning stick of wood and threw it at the prisoner, which struck him on the shoulder and back, and caused his knees to bend or give way under him. At the time the prisoner received this blow, he was not near enough to strike the deceased, but was some eight or nine paces from him, and advancing towards him when struck. Immediately after receiving the blow, he pressed upon and after the deceased around the fire, and struck him one blow upon the head with the axe. The deceased, with the assistance of Prince and the witness, walked to the village of Rockfish, where he was taken into the house of the prisoner by his directions. On the next day the deceased was walking about, when the same witness observed to the prisoner it was fortunate that *he* was present, as he might have killed the deceased. The prisoner replied, with an oath, "That was what I intended."

The second branch of the charge was as favorable to the prisoner as well could be. His Honor confined the attention of the jury carefully to the transaction at the fire in the yard at Prince's, throwing out of view entirely, the previous fight at Hays', the same night. The jury were instructed that if the testimony were believed, the case was one either of murder or manslaughter; and whether one or the other, would depend mainly upon the view which they might take of what took place at the time when the blow was given; for, as the parties had made friends, if a legal provocation was given, the conduct of the prisoner was to be ascribed to that, and not to any previous quarrel.* The charge then proceeds: "If, after words of anger the prisoner had taken up his axe and approached the deceased, with a *present purpose and design* to take away his life, or to do him some great bodily harm, and the jury should, from the facts, be of opinion that the deceased had sufficient grounds to believe that such was the intention of the prisoner, after the enquiry and warning given, he (the deceased), had a right to defend himself, and the throwing the chunk of fire, though the prisoner might not have been within striking distance, would not furnish such a legal provocation as to excuse the act of the prisoner, and it would be a case of murder." The Judge then places the case upon the opposite hypothesis, that the prisoner had no present intention, and leaves it as a proper enquiry for them, and closes with the usual charge as to reasonable doubt. There can be no doubt as to the correctness of the charge upon this point in the view which his Honor took of the reconciliation. According to the evidence, when the prisoner advanced toward the deceased, it was with a deadly weapon, raised after a quarrel; the deceased challenged him as to his intention of killing him; the prisoner made no reply, but continued to advance upon him; he was told if he did not stop, the deceased would knock him down; this threat did not stop him; the deceased was unarmed,

*See Copeland's case, *ante*, on the subject of "old grudge."

and when the prisoner was within eight or nine steps of him, not near enough to strike, the deceased threw the chunk. He then endeavored to make his escape; the prisoner pressed upon him while so retreating, and gave the fatal blow. Death ensuing, the prisoner was guilty of murder. If, when the prisoner was advancing upon the deceased with his axe, the latter had killed him, he would have been justified in law. A man may kill another who assaults him in the highway to rob or murder him. So may any man justify a homicide to prevent the person slain from committing a felony. Hawk. B. 1, ch. 10, §21. Now, was it necessary for the deceased in this case, to wait until the prisoner got near enough to strike with his axe? In such case, it might be too late to protect himself. Thus, if a man is advancing upon me with a drawn sword, or a loaded pistol, with the avowed purpose to kill me, I am not called on to wait until he gets within the distance necessary to execute his purpose, but the law allows me to arrest his progress at any moment my safety demands it. The deceased then, had a right to strike the prisoner with the chunk of fire, as stated in the case, and it was not in law, a legal provocation to extenuate the killing of the deceased into manslaughter. 4 Bla. Com. 180.

Judgment affirmed.

NOTE.—To justify killing in self-defence, the danger must be imminent. Thompson's case, *post*. And not in machination only. McLeod's case, *post*. And evidenced by overt demonstrations. Harrison's case, *ante*; Lander's case, *post*; Dyson's case, *post*; Scott's case, *post*; Rippy's case, *post*; Evans' case, *post*; Hinton's case, *post*; Williams' case, *post*. But as to when it may be said to be imminent, no general rule can be laid down. Each case must depend on its own circumstances. Cotton's case, *post*; Robert Jackson's case, *post*. The threatened danger may be impending every moment and everywhere, as in case of an abandoned, blood-thirsty man seeking another's life; and then the person threatened is not obliged to run away, nor to wait for the danger to fall, but may secure himself by killing his adversary. Philips' case, *post*; Carico's case, *post*; Young's case, *post*; Bohannon's case, *post*. Contra, Lander's case, *post*. It will also be sufficient if the danger be *apparently* imminent. Sullivan's case, *ante*; Shorter's case, *post*, and note.

-HOPKINSON v. THE PEOPLE.

[18 ILL., 264.]

*Supreme Court of Illinois, April Term, 1857.*WALTER B. SOATES, *Chief Justice.*JOHN D. CATON, } *Associate Justices.*
ONIAS C. SKINNER, }**ASSAULT, WITH INTENT TO MURDER—SELF-DEFENCE AS A JUSTIFICATION.**

1. It is a rule on indictments for assault, with intent to murder, that if the circumstances had been such that if the prosecutor had been killed it would have been murder, the defendant will be guilty of an assault with intent to murder. [Acc. Rapp's case, *post.*]

2. But it does not follow that, because the killing, had it occurred, would not have been *justifiable* or *excusable*, the shooting, therefore, amounted to an assault with intent to murder; because, had death taken place, it might neither have been murder nor justifiable or excusable homicide, but manslaughter; in which case, death not occurring, the defendant would not be guilty of an assault with intent to murder.

3. Justifiable and excusable homicide, according to the Illinois statute, defined.

4. The jury should determine under what circumstances the assault was made; and the instructions should be given hypothetically, and not assume the existence of a certain state of facts.

The opinion of the Court furnishes a statement of the case. This cause was tried before HOLLISTER, J., at October Term, 1855, of the Bureau Circuit Court. Hopkinson was found guilty, and prosecutes this writ of error.

SKINNER, J., delivered the opinion of the Court:

This was an indictment against Hopkinson for an assault upon Cummings, with intent to murder. The evidence showed, that on the evening prior to the alleged assault, the parties met and had some words, whereupon Cummings caught Hopkinson by the throat and choked him down, and that Hopkinson, on getting loose from Cummings' hold, ran off; that the next day they again met with others, when Cummings accosted Hopkinson, referring to their previous difficulty, telling him to

“stand off”; that Hopkinson then drew a pistol; that Cummings advanced upon Hopkinson, telling him to “put up his pistol,” and Hopkinson retreated, or fell back, calling to Cummings to “stand back or he would shoot him,” when Hopkinson fired, but without effect, and fled, Cummings chasing him.

The jury found the defendant guilty, and the Court refused a new trial. The Court gave, on the part of the people, the following instructions:

1st. If the jury believe, from the evidence, that the defendant, in April last, and within this county, made an assault upon John Cummings, with a pistol, under such circumstances that if Cummings had been killed, such killing would have been murder, then the jury are bound by law to find the defendant guilty.

2d. The fact that Cummings had spoken disparagingly of defendant's work, or told him to put up his pistol, or advanced towards him, without any threat, or offer of violence, would not justify defendant in using a deadly weapon, and if he did use a deadly weapon in assaulting Cummings under such circumstances, and Cummings had been killed thereby, then the defendant would have been guilty of murder.

3d. The killing of Cummings, if it had resulted from defendant's assault, would not have been justifiable or excusable, unless the danger to Hopkinson was so great that in order to save his own life or prevent his receiving great bodily harm, the killing of Cummings was absolutely necessary.

4th. If Cummings had been intentionally killed in the assault by defendant, the defendant would have been guilty of murder, unless he had received a serious and highly provoking injury, and was roused thereby to an irresistible passion, or that the killing of Cummings was necessary to save defendant from being killed, or from receiving great bodily injury.

It is true, if the circumstances were such that if Cummings had been killed by the shot, it would have been murder, the defendant failing to kill, would have

been guilty of an assault, with intent to murder; but it does not follow, that because the killing, had it occurred, would not have been justifiable or excusable; that, therefore, the shooting amounted to an assault, with intent to murder. Justifiable homicide, is the taking of human life in the necessary defence of one's person against violence; in the defence of his property or habitation against those endeavoring to commit a felony, or enter the habitation in a violent, riotous or tumultuous manner, with intent to commit violence to persons therein; from unavoidable necessity, or under judgment of the law. Excusable homicide, is the unfortunate or accidental killing of another, without intention, and in doing a lawful act, with ordinary circumspection. And "all other instances standing upon the same footing of reason and justice" come within these rules. Criminal Code, §§ 32, 36, 37 and 38.^a

The circumstances attending the killing may be such, that the act is neither justifiable nor excusable, and still not be murder. It may amount to manslaughter only, in which case, had death not ensued, the person assaulting could not be guilty of an assault with intent to murder. Ibid, §§ 25, 26, 27 and 28.^b

The apparent object, or, at least, tendency of the three first instructions, was to give the jury to understand, that if Cummings had been killed by the shot, and the circumstances in such case would not have justified or excused the act, the defendant would therefore, be guilty of the crime charged. If the circumstances attending the assault were such as to justify a reasonable conclusion in the mind of Hopkinson, of impending danger of serious bodily injury from Cummings, and he acted from the instincts of self-preservation, and not from motives of malice or revenge, he could not be guilty of the crime charged, although, in fact, there was no actual danger. Ibid, §§ 33 and 52; *Campbell v. The People*,^c 16 Ill. R. 17.

^a Gross' Illinois Statutes, 1869, p. 172. ^b Ibid. ^c Post.

The second instruction is objectionable, in assuming a certain state of facts to exist, and from which the jury might conclude they were deemed by the Court, established. It was for the jury to determine under what circumstances the assault was made, and the instruction should have simply stated the law hypothetically, arising out of the given state of facts, that is, if so found by the jury. *Sherman v. Dutch*, 16 Ill., R. 283; *Wall v. Goodenow*, Ib. 415.

Judgment reversed, and cause remanded.

Judgment reversed.

HINTON v. THE STATE.

[24 Tex., 454.]

Supreme Court of Texas, Austin, 1859.

ROYALL T. WHEELER, *Chief Justice.*

ORAN M. ROBERTS, } *Associate Justices.*
JAMES H. BELL, }

**IMPROPER TESTIMONY NOT OBJECTED TO, NO GROUND OF REVERSAL—
REASONABLE BELIEF OF DANGER NOT SUFFICIENT TO EXCUSE KILLING,
UNLESS ACCOMPANIED BY OVERT ACTS—DEGREE OF FORCE IN EX-
PELLING TRESPASSER—TRESPASSER NO RIGHT OF RESISTANCE, ETC.**

1. Where the wife of the deceased, testifying for the State, stated on cross examination that her husband had told her that the defendant would kill him some day; and this testimony was not objected to, nor was any motion made to exclude it from the jury, held that its admission was no ground for reversing a conviction of murder in the first degree.

2. Sudden passion is a necessary element of the offence of manslaughter under the Texas Code; hence, it is not error to refuse a charge attempting to define this offence, which omits this as one of the ingredients.

3. A reasonable belief that another intends to inflict on the party some serious bodily injury, and that he is in such a position that he may carry his intention into effect, is not sufficient to excuse the killing of him upon that apprehension; such belief must be founded in part upon some overt

act of the deceased, showing that he has a present intention to inflict the injury ; and even then the means used to repel the assault and prevent the impending injury, must be only such as are necessary under the circumstances. [See Baker's case, and note, *ante*.]

4. Although one person may make an assault upon another with a knife, but under such circumstances of incapacity from physical debility as to preclude any reasonable grounds for fearing death or serious bodily harm, the assailed will not be excused in killing the assailant.

5. A person who puts himself in the wrong by refusing to go out of another's house when commanded to do so, is bound to submit to as much force as is necessary to put him out; and if, while such necessary and reasonable force is being applied to him, he turns and kills the owner with a deadly weapon, it is murder, and not justifiable self-defence.

6. In such case his right of resistance would not be called into existence at all, unless the owner used, or was in the act of using, or was manifestly about using, more force than was necessary to put him out; and then he would have the right to resist; but only to the extent, and by the use of the means necessary to repel such excessive force, so used or impending.

This was an indictment found on the fifth day of April, 1859, charging William J. Hinton with the murder of Pleasant C. Whittaker:

The facts proved upon trial, showed that the defendant and the deceased were brothers-in-law; and that the defendant came to Whittaker's house, on the evening before the difficulty, and staid all night. The deceased had previously been drinking, and was very much debilitated, and as his wife testified, "able to go about from room to room, and that was about all." The wife of the deceased, and sister of the defendant, was confined to her bed with sickness. When the defendant came, the deceased sent off for whiskey, and they drank that evening, and during the night.

Before daybreak, one Covington, who had been drinking with them during the evening, came to the house again, and they resumed their drinking, during which Covington and Hinton quarrelled; Mrs. Whittaker being disturbed by the noise, requested Covington to leave; with which he complied; Hinton followed him into a cotton field, and resumed the quarrel, having a pistol, which he presented at him; Covington expostulated with him, and pacified him; whereupon he urged Covington to return to the house, who replied that he did not wish to

"make a fuss there, and disturb his sister;" Hinton, among other things in reply, said that if Whittaker fooled with him, he would blow his G—d d——d heart out; that Whittaker should not run over him, because he had a few negroes, and he (defendant) did not have any.

Before this part of the transaction occurred, the defendant and the deceased came into Mrs. Whittaker's room, having three or four pistols in their hands, which they gave to her to be locked up. A short time afterwards the defendant called for his pistol, saying that he would go home, and it was delivered to him. Covington and Hinton returned to the front gate in company. Mrs. Whittaker sent her little daughter to the gate, requesting the defendant not to come into the house, but to go home. He came into the house, and into her room, and cursed and swore very loudly; he demanded of her why she had sent him word to go home. She replied that she wanted no fuss, and desired him to go home. He refused to comply, unless she would "tell him what he had done."

When the defendant came into the room, the deceased followed him, and requested him to go home, and not to disturb his wife; that they had kept her awake all night, and "now go home." The deceased was crying during this conversation. He repeated, as many as three times, the expression, "all I ask of you, is to go home." The defendant started to leave the room. Covington testified, that when the deceased went into the room, he said, "Bill, go home;" and that the defendant swore he would not leave until he got ready; that his request being repeated two or three times, the deceased said, "look at the situation of your sister;" when the defendant said, "he did not care; that she was as near to him as to the deceased." Whittaker replied, that "he need not think he could run over him in his own house; that he was as brave a man as he dare be."

Mrs. Whittaker stated, that when Hinton started to leave the room, the deceased drew his knife from his

pocket, but she did not see him open it; and expressed a doubt as to his ability to open it, owing to his weakness; she thought, indeed, that he could not. She stated that he had no knife in his hand after he was shot; that it was in his pocket, having been taken out and handed to her, after the shooting.

Covington stated, that Whittaker came out of the room behind Hinton, with his hand on his shoulder or back, as if gently pushing him along; the defendant did not seem to resist, but walked along through the hall, to the front passage; that when they reached the front gallery, Hinton turned, pushed Whittaker back, fired, and ran; that the deceased had a knife in his hand, as he came out of the room; the knife, which was a common pocket-knife, was open or half open; he did not attempt to use it, and it was held in his right hand, as his arm hung down by his side.

The daughter of the deceased testified, that as the deceased went out of the room with the defendant, she endeavored, by taking hold of her father's hand, to take the knife from him, which was in his hand, hanging down by his side, as he was walking along. Whilst the deceased was on the gallery, before he was shot, he requested the defendant to go home; to which he replied, with an oath, that he would not leave there until he got ready. The deceased replied, that he would compel him to go; he made no attempt to use his knife, nor used any threats; and was in the act of putting his knife in pocket, at the time he was shot. The defendant was standing on the ground, and the deceased upon the gallery, when he fired.

The death of Whittaker, from the wound inflicted by the defendant, occurred on the 27th day of December, 1858, three days afterwards. The jury found the defendant guilty of murder in the first degree; and the judgment of the Court was rendered in accordance with the verdict, sentencing him to death.

The defendant filed a motion for a new trial on the grounds. 1st. That the verdict was contrary to the law

and evidence. 2d. That the Court erred in refusing to give the second and third charges asked by the defendant's attorneys. 3d. The Court erred in permitting the testimony of Mrs. Whittaker, of the declarations made by her husband, not made in view of death, to go to the jury, as evidence.

The statement of facts contained the evidence of Mrs. Whittaker, referred to in the last ground of the motion, to the effect stated in the opinion. No objection appeared to have been made to its introduction, nor was there any other reference to it than as already shown.

The motion was overruled, and the defendant appealed and assigned for error the grounds specified in the motion for a new trial.

A. G. Perry, for the appellant; *Attorney-General*, for the appellee.

ROBERTS, J.:

The defendant's counsel asked the Court to charge the jury—

* * * * *

3d. That if the jury believe from the testimony, that the prisoner, at the time of discharging his pistol, had reasonable grounds to believe that the deceased intended to inflict on him some serious bodily injury, and that deceased was in such a position that he might have carried his intention into effect, and acting under such apprehensions, the defendant gave the mortal wound, the act would be excusable, on the ground of self-defence.

* * * * *

The objection to the third charge asked, is, that it is too loose and indefinite to convey to the jury a correct idea of the principle of self-defence, whether it be considered as an abstract proposition, or in reference to the facts in proof. The reasonable belief that Whittaker intended to inflict on him some serious bodily injury, must be founded in part upon some act of Whittaker, (other than his merely being "in such a position that

he might have carried his intention into effect,") showing that he, Whittaker, had the present intention to inflict the injury. Even then, to excuse or justify the defendant, the means used to repel the assault of Whittaker, and prevent the impending injury, must have been only such as were necessary under the circumstances. Suppose A. has reasonable grounds to believe, and does believe, that B. intends to kill him the first time they meet. They afterwards do meet, both armed, and near enough to put B. in a situation to carry out his intention. Now if B. makes no demonstration of the carrying out such intention, A. is not justified in killing him. And if he does make such demonstration, but with means, and under circumstances of incapacity caused from personal debility, such as render it obviously unnecessary for the person assaulted to take his life, in order to protect himself from harm, then A. would not be justified in such unnecessary killing. The charge is evidently defective in not guarding these important points in the doctrine of self-defence.

This charge, had it been properly framed, would hardly have been applicable to the facts in proof. The defendant had put himself in the wrong, by his conduct towards the deceased and his wife, in their own house, and still further in the wrong, by refusing to go out of the house when requested by them. Whittaker had a right to put him out of the house; he had a right to go along with him to the steps of the entrance, with his hand on his shoulder, and to tell him that he would make him go; and he had a right to take out his knife, for his defence, against a man armed with a pistol, who had shown his readiness to use his arms recklessly. The defendant, by his own conduct, had made all this necessary and proper on the part of Whittaker. What else was done which put him in a position to have the right to act on the offensive, by shooting the deceased the moment he, Hinton, left the steps, or while still on the gallery? Was he in danger of being cut with the knife? There is no evidence that Hinton saw the knife, or acted

with reference to any danger from the knife, when he did shoot. And there is not the slightest evidence, that Whittaker intended to assault Hinton with the knife. For the witness, who states that the knife was "open or half open," also states that he did not attempt to use it; that it was a common pocket-knife, and was in his right hand, as his arm hung down by his side; that the deceased had his left hand on the defendant's shoulder or back, walking behind him, and that when they reached the front gallery, Hinton turned, pushed Whittaker back, and fired and ran. There had nothing happened previously, to show that Whittaker intended to do more than put him out of the house; for he had repeatedly besought him, while shedding tears, to leave and go home; and had been goaded into the resolution of putting him out of the house, only by the unreasonable replies of Hinton. Furthermore, it was shown, that Whittaker was extremely debilitated from drinking some time previously, and for that reason alone, it does not appear that it was necessary for Hinton's defence, that he should resort at once to the extreme remedy of shooting.

Thus the facts in proof show, that Whittaker, while doing a lawful act in a lawful manner, was killed by Hinton; and there is not a fact proved, which tends to establish the contrary, or that Hinton had reasonable ground to regard Whittaker's acts in any other light, than as the exercise of a lawful right, done in a lawful manner..

Hinton having placed himself in the wrong, in refusing to go out of the house until he got ready, was bound to submit to the force reasonably necessary to put him out. His right to resist the force of Whittaker, would not be called into existence at all, until Whittaker used, or was in the act of using, or being then manifestly about using, more force than was necessary to put him out. And then Hinton would have the right to resist, but only to the extent, and by the use of the means, necessary to repel such excessive force so used or impending.

Such are the rules applicable to the facts of the case, and are very different from the third charge asked and refused. There was no part of the original charge of the Court prejudicial to the defendant. Murder, in its different degrees, as well as manslaughter, were properly explained.

We cannot say that the facts do not warrant the jury in the conclusion, to which, under the charge, they must have arrived, that the act of killing was done with express malice.

Judgment affirmed.

NOTE.—Upon the principle that a person cannot himself provoke the necessity of slaying another in his own defence, and then urge that necessity as an excuse for the homicide, see Selfridge's case, *ante*; Adams' case *post*; Neeley's case, *post*, Benham's case, *post* and Stewart's case, *post*. Akin to the doctrine of the principal case, is Baker's case, *ante*, that an assault which the defendant by his own threatening conduct, compels the deceased to make in his defence, cannot constitute such a legal provocation as will reduce a killing to manslaughter. But a libellous publication will not prejudice one's right of defence in case he is assailed. Selfridge's case, *ante*.

The following manuscript case, cited by Mr. East, accords in its facts and conclusions with the principal case :

Two soldiers came at eleven o'clock at night to a publican's and demanded beer, which he refused, alleging the unseasonableness of the hour, and advising them to go to their quarters, whereupon they went away, uttering imprecations. In an hour and a half afterwards, when the door was opened to let out some company, who had been detained there on business, one of them rushed in, the other remaining without, and renewed his demand for beer, to which the landlord returned the same answer; and on his refusing to depart, and persisting to have some beer, and offering to lay hold of the landlord, the latter at the same instant collared him; the one pushing and the other pulling each other towards the outer door; where, when the landlord came, he received a violent blow on the head with some sharp instrument, from the other soldier, who had remained without, which occasioned his death a few days afterwards. Mr. Justice BULLER held this to be murder in both, notwithstanding the struggle between the landlord and one of them, For the landlord did no more in attempting to put the soldier out of his house at that time of the night, and after the warning he had given him, than he lawfully might, which was no provocation for the cruel revenge taken; more especially, as there was reasonable evidence of the prisoners having come the second time, with a deliberate intention to use personal violence, in case their demand for beer was not complied with. *Rex v. Willoughby and another*, Bodmin Summer Assizes, 1791; 1 East P. C. 288.

Lyon v. The State, 22 Ga., 399, is also similar to the principal case in its

character and conclusions. In that case, which was an indictment for assault with intent to murder, error was assigned on the refusal of the Circuit Judge to charge "that an actual assault by the person killed upon the person killing, may reduce the offence to the grade of manslaughter."

McDONALD, J., delivering the opinion of the Court, said: "We think there was no error in the refusal of the Court to give the charge as requested. The request was simply an abstract principle of law, proper or not, according to the proof in the case in which the request was made. He carried deadly weapons with him, which it was unlawful for him to carry, and the evidence shows he was quite ready to use them. He knew he had no right on the premises, and supposed that the owner, if he found him there, would probably attempt to drive him off, and went prepared to take his life if he did. *No assault that could have been made upon him by the prosecutor, short of an attempt to take the life of the intruder, or made in a manner to induce the apprehension that such was the intention, could have reduced the killing, if he had killed the owner, from murder to manslaughter.* His going armed with a loaded pistol, prepared to meet any emergency, is evidence of malice. If it was a contrivance to get the prosecutor to assault him that he might take his life, it would have been murder if he had killed him. If he went there to defy all resistance of his purpose, the prosecutor might have been justified, not only in assaulting, but killing him. It is not necessary to extend remarks upon the subject. It might be improper to do it. It is sufficient to say that there was no error in the refusal of the Court below to give the charge as requested, and that the judgment must be affirmed."

A more general statement of the doctrine of the principal case will be found in *The State v. Lawry*, 4 Nev. 161, 170. The defendant was indicted for an assault with a deadly weapon, with intent to inflict bodily injury, etc. In testifying for himself on the trial, he said: "My intention in seeking an interview with Murphy (the assailed) at Sheridan, was to make him abandon his proceedings in the Land Office." With reference to this, the Supreme Court, per LEWIS, J., said: "And this doubtless explains the cause for the assault. But the proceedings to pre-empt by the prosecuting witness, were the exercise of a right which the law gave him, and therefore cannot be considered a provocation in any sense of the word. *The simple exercise of a legal right, no matter how offensive to another, is never in law deemed a provocation sufficient to justify or mitigate an act of violence.*"

A very strong illustration of the same principle will be found in *The State v. Craton*, 6 Ired., 164, where several authorities are cited in support of the doctrine. It was held in that case, that a man might lawfully arrest another on the highway, in order to compel the latter to surrender up the custody of his wife, who was seeking to dishonor her; and it made no difference that the wife consented to such dishonor; and the person so arrested having killed the injured husband, it was murder and not manslaughter. For, although if a man illegally or injuriously restrained of his liberty, kill the person imposing such restraint, it is ordinarily but manslaughter; yet, if the restraint be lawful, it is murder.

See, as to the defence against unlawful arrest, SUBDIVISION E. of this PART, *post*; and as to defence of wife's chastity, see *Staten's case*, and note, *post*.

THE STATE v. THOMPSON.

[9 IOWA, 188.]

*Supreme Court of Iowa, June Term, 1859.*GEORGE G. WRIGHT, *Chief Justice.*WILLIAM G. WOODARD, } *Judges.*
L. D. STOCKTON,

DEFENCE AGAINST FELONIOUS AND NON-FELONIOUS ASSAULTS DISTINGUISHED—KILLING IN 'SELF-DEFENCE, DANGER MUST BE ACTUAL—WHEN ASSAILED MUST RETREAT BEFORE KILLING, AND WHEN NOT.

1. A man may repel force by force in the defence of his person, habitation or property, against one who manifestly intends, by violence or surprise, to commit a known felony upon either; and if a conflict ensue in such case, and he take life, the killing is justifiable.

2. To make a homicide excusable on the ground of self-defence, the danger must be shown to be actual and urgent. No contingent necessity will avail. It must be proved that the assault was eminently perilous; and without there be a plain manifestation of a felonious intent, no assault will justify killing the assailant. [Acc. Whart. Crim. Law, § 1020, 5th Edition. But see Neeley's case, *post*, where the force of this language is attempted to be explained away.]

3. But a man is not obliged to flee from his adversary, who assails him with a deadly weapon, and retreat to the wall, before he can justify the homicide. The assault may be so fierce as not to allow the person assailed to yield a step without manifest danger of life, or of enormous bodily harm. In such cases, if there be no other way of saving his own life, he may, in self-defence, kill his assailant, and the killing will be justifiable. [Upon the subject of "retreating to the wall," see note to Selfridge's case, *ante*, p. 28; also note to James D. Kennedy's case, *post*.]

4. But when the attack is not felonious, the rule of law is different. If it is not apparent, from the manner of the assault, the nature of the weapon used, and the like, that the assailant intended to commit a felony, that the danger was imminent, and that the species of resistance used was necessary to avert it, the party assailed is not justified in resorting to the use of a deadly weapon, and using it in a deadly manner. [Acc. Wiltberger's case, *ante*; Stewart's case, *post*; John Kennedy's case, *post*; Benham's case, *post*. Nor to repel a trespass upon property not amounting to felony: Harrison's case, *ante*, and cases cited.]

5. Under the Iowa statute, [Code of 1851, §§ 2594 and 2817,] an assault, even with the intent to inflict great bodily injury, is not a felony.

6. Where the deceased, who was a quarrelsome and violent man, one that would resort to deadly weapons or anything else when engaged in a

conflict, ran after the defendant with a heavy board, capable of inflicting great bodily injury, and threw the board down, and continued the pursuit without any visible weapon, and when close upon the defendant, the latter turned and shot and killed him with a pistol, this was manslaughter, and not excusable self-defence; and it was proper to refuse to charge "that if the defendant was a cripple, and so disabled that he was unable to defend himself by any other method in his immediate power, except to resort to a deadly weapon, then he is excusable in using such a weapon, to protect his person from a violent battery and beating."

Indictment for manslaughter, in killing one Brewer. Verdict, guilty. Sentence, one year in the penitentiary, and to pay a fine of one hundred dollars. Appeal and assignment of error in the ruling of the Court, on the defendant's challenge of a juror, and the refusal of certain instructions, which are stated in the opinion of the Court.

Hall, Harrington & Hall, cited as to the instructions, *Shorter v. The People*,^a 2 Comst. 93; *The People v. McLeod*,^b 1 Hill, 377; *Com. v. Selfridge*,^c Whart. Hom., 456; *Com. v. Seibert*, *Ib.*, 428.

Samuel A. Rice, Attorney-General, for the State.

STOCKTON, J. * * * * *

The defendant asked the Court to charge the jury, that if the defendant was a cripple, and so disabled that he was unable to defend himself by any other method in his immediate power, except to resort to a deadly weapon, then he is excusable in using such a weapon, to protect his person from a violent battery and beating.

This instruction the Court refused to give, but charged the jury as follows:

1. That although the deceased may have menaced and threatened to assault the prisoner with his fists, the prisoner was not justified in repelling such an assault, by resorting to a concealed deadly weapon, and using it in such a manner as to produce death.

2. That while a person is not bound to retreat from a place where he may rightfully remain, and may lawfully repel a threatened assault, and to that end may use

^a *Post.* ^b *Post.* ^c *Ante*, p. 1.

force enough to repel the assailant; yet he has no right to repel a threatened assault with naked fists, by the use of a deadly weapon, in a deadly manner, and which he has concealed up to the time of its use.

3. Before a party is justified in resorting to a concealed deadly weapon, and using it in a deadly manner, it must appear that he was in imminent peril of death or great bodily harm, or that a reasonable man under like circumstances, would have reasonable grounds to believe that he was in peril of losing his life, or sustaining great bodily harm, and that he could not otherwise have saved his life or person from great bodily harm.

It appeared in evidence, that the deceased had assaulted the defendant, and pursued him with a heavy board, sufficient to do great bodily injury; that he threw down the board, and followed defendant in a threatening manner, but having no visible weapon; and that while defendant was retreating and the deceased, pursuing, had arrived within a few feet of him, the defendant turned and shot the deceased. The evidence further showed, that some ten days or two weeks before the killing, the defendant had been severely injured by a fall from a horse, and some of his ribs broken, and was a cripple; and that deceased was a quarrelsome and violent man, and would resort to deadly weapons or anything in his power, when engaged in conflict.

The Court further charged the jury, that disparity of physical power and strength between men, will not justify the weaker party in suddenly, and without any warning, resorting to a deadly weapon, and using it in a deadly manner, when menaced and threatened with an assault, by or with fists alone; and unless the situation and condition of the parties, and the circumstances under which they are placed, are sufficient to induce a man of reasonable and ordinary prudence and judgment, to believe great bodily harm or injury might reasonably be expected to follow, if the menaces and threats be carried out, in which case, the prisoner had a right to use such deadly weapon.

We think there was no error in the refusal of the Court to give the instruction asked. A party may repel force by force in the defence of his person, habitation or property, against one who manifestly intends or endeavors by violence or surprise, to commit a known felony upon either; and if a conflict ensue in such case, and he takes life, the killing is justifiable. To make a homicide excusable on the ground of self-defence, the danger must be shown to be actual and urgent. No contingent necessity will avail. It must be proved that the assault was imminently perilous; and without there be a plain manifestation of a felonious intent, no assault will justify killing the assailant. Whart. Am. Cr. Law, 436.^d It has been held by this Court, that a party is not compelled to flee from his adversary, who assails him with a deadly weapon, and retreat to the wall, before he can justify the homicide. *The State v. Tweedy*,^e 5 Iowa, 334. The assault may be so fierce, as not to allow the party assailed to yield a step, without manifest danger of his life, or of enormous bodily harm. In such cases, if there be no other way of saving his own life, he may, in self-defence, kill his assailant, and the killing will be justifiable. But when the attack is not felonious, the rule of law is different. If it is not apparent, from the manner of the assault, the nature of the weapon used, and the like, that the assailant intended to commit a felony, that the danger was imminent, and that the species of resistance used was necessary to avert it, the party assailed is not justified in resorting to the use of a deadly weapon, and using it in a deadly manner. *United States v. Wiltberger*,^f 3 Wash. C. C. 521.

In Tennessee, it has been held that if a man, though in no danger of serious bodily harm, through fear, alarm or cowardice, kill another, under the impression that great bodily injury is about to be inflicted on him,

^d 5th edition, §§ 1019, 1020.

^e *Post*; note to James D. Kennedy's case, *post*; and see note to Selfridge's case, *ante*.

^f *Ante*.

it is neither murder nor manslaughter, but self-defence. *Grainger v. The State*,^s 5 Yerg. 459. "This," says Bronson, J., in *Shorter v. The People*, 2 Comst. 197, "was going too far. It is not enough that the party believed himself in danger, unless the facts and circumstances were such that the jury can say, that he had reasonable grounds for his belief."

Under our statute (Code §§ 2594, 2817), an assault, even with intent to commit great bodily injury, is not a felony. An assault, without a weapon of any kind, by a quarrelsome and violent man, upon one in the condition of the defendant, can hardly be construed into a felonious assault. If, under the circumstances, there was no reason for the belief by the defendant, that his person was in danger of death or great bodily harm, but that an ordinary battery was all that was intended, and all that he had any reason to fear from the acts of the deceased, he had no right to take the life of his assailant.

The instructions given by the Court to the jury, we think, were as favorable to the defendant, as he had any right to require to be given to the jury.

Judgment affirmed.

THE STATE v. NEELEY.

[20 IOWA, 108.]

Supreme Court of Iowa, December Term, 1865.

RALPH P. LOWE, *Chief Justice.*

JOHN F. DILLON,	} <i>Judges.</i>
CHESTER C. COLE,	
GEORGE G. WRIGHT,	

INSTRUCTIONS—SEEKING THE ENCOUNTER—ACTING UPON APPEARANCES
—OCCASION PRODUCED BY THE SLAYER'S OWN WRONG, NO DEFENCE.

1. The following instruction was, on the facts of this case, properly refused: "If the jury find from the evidence, that after the first shot was

* *Post.*

fired down the field, if such shot was in fact fired, and when the defendant turned back to go down along the fence to the place where the homicide is alleged to have been committed, he did not know that Patrick Casady was approaching with a loaded rifle, with a view to an encounter, if there was such an intent, by reason of the intervening fence, if there was such an intervening fence, and by the shadow of the trees, then the fact that the defendant did go back to the place of homicide, is no evidence that the defendant went back to accept or seek a fight with the deceased."

2. The rule of Selfridge's case, that a reasonable apprehension of death or great bodily harm will excuse the slayer, and that declared by Baron PARKE, in *Rex v. Thurston*, 1 Den. C. C. 387, that the guilt of the prisoner must depend upon the circumstances as they appear to him, are recognized and approved; and where the Court had already correctly instructed the jury in this respect, the following instruction, given at the request of the State, was not erroneous: "To sustain the plea of self-defence, the defendant must show that Patrick Casady assaulted him, and that the assault was imminently perilous, and the danger to the defendant *actual* and urgent." For the word "actual," in this connection, is to be understood as meaning, not actual in fact, but actual to the defendant's comprehension. [See note, *sub. fin.*]

3. If the prisoner with a loaded weapon sought the deceased with the view of provoking a difficulty, or with the intent of having an affray, and a difficulty did ensue, he cannot, without some proof of change of conduct or action, excuse homicide upon the ground that the deceased fired the first shot; for the law will not hold him guiltless, who, by seeking a combat and continuing therein, brings upon himself the necessity of killing his fellow man. It is upon the plain principle, that one cannot willingly and knowingly bring upon himself the very necessity which he sets up for his defence. [Acc. Selfridge's case, *ante*; Adams' case, *post*; Stewart's case, *post*; Hinton's case, *ante*. And see Baker's case, *ante*. But a libellous publication is not such a procurement of the difficulty as deprives a party of the right to take life in defence. Selfridge's case, *ante*.]

4. It was, therefore, correct to instruct the jury, that if the defendant brought on the difficulty by voluntarily returning to the vicinity of the deceased, with a deadly weapon, for the purpose of provoking a difficulty, or with the intent of having an affray, his plea of self-defence would be of no avail, and it would make no difference who fired the first shot.

Appeal from Polk District Court.

The indictment is for murder in the second degree. Plea, not guilty. Verdict, guilty. Motions in arrest, and for new trial, overruled. Sentence, fifteen years in the penitentiary.

Finch, Clark & Rice, for the appellant; *F. E. Bissell*, Attorney-General, for the State.

WRIGHT, J. * * * * * * [The

portion of the opinion here omitted, relates to the sufficiency of the indictment.—Eds.]

2. Objections are urged to several instructions given for the State, and to the refusal of others asked by the defendant. Before considering these, a brief reference to the general facts becomes material. The prisoner and the deceased lived on adjoining farms, the latter making his home with his mother. The families were not on friendly terms. The fences around the farm of Mrs. Casady were bad. The prisoner's, as also the stock of others, broke through occasionally and were injured by dogs, and otherwise. On the morning of the day of the homicide, the prisoner, influenced by the belief that his hogs were being injured by dogs, went with his gun to the field, where some children belonging to the Casady family were, and shot their dog, or one belonging to the family. Mrs. Casady and her daughter afterwards went to the house of the prisoner, where an angry altercation ensued, and they returned to their home. As to all that took place at this altercation the witnesses differ, and it is not material to refer to it in detail.

After this, and late in the afternoon, hogs were again heard in the field, apparently being worried by dogs, and the prisoner hurried there with his gun; and, according to the testimony of the State, pursued the sister of the deceased, and the children through the field, in the direction of their house. On their return home, upon telling their story, the deceased, who was ill from an injury received on the day before, (but of which the prisoner knew nothing, nor did he know that he was at home), with his mother and sister, left the house and passed down to the field; the deceased having with him a small rifle gun. In the meantime the defendant had left the field, and gone in an almost opposite direction from the other parties, about two-thirds of the way to his own house, a distance, perhaps, of sixty or seventy rods. The other parties were now passing along a path inside of the fence. At this time some of the witnesses say that a shot was fired in the field, while others heard

nothing of it. The prisoner, either because he heard a shot, or saw the deceased and his mother and sister, or for some cause not developed, turned and walked hurriedly back to where they were. When within a few feet of them, (eight or ten), and after, according to the testimony of the State, a few words had passed between them, the prisoner shot and killed Casady.

The State claims that the shooting was without provocation, while the prisoner insists that he shot in self-defence. He received a gun-shot wound in his left hand. According to the testimony of some of the witnesses, who were some distance from the scene of the homicide, there was first heard the sharp crack of a rifle, then instantly, the heavier sound of a musket or shot gun, and almost as quick after, a third shot like the second. The prisoner had and fired a small double-barrelled shot gun, and the third shot was at a dog, according to some witnesses, and according to others, at Mrs. Casady. There is no positive testimony as to how the wound was inflicted on the defendant's hand. The theory of the defence is, that Casady shot first, and thus wounded the prisoner, which theory is expressly denied by the testimony of Mrs. Casady and her daughter, the only witnesses present, who state unequivocally that he did not fire, nor offer to fire his gun. The wound is attempted to be accounted for by the State, upon the theory that as Casady fell, (the shot was almost instantly mortal) his gun, which he claimed he held near the muzzle, in falling was discharged, the shot of which passed through defendant's hand. That both barrels of defendant's gun were discharged at the time of the homicide, is pretty well established. The shot in the field before he turned back, if there was one, is attempted to be accounted for by the presence of a third gun found near the scene, which it is claimed Mrs. King (the sister) had. She swears, however, positively, that this gun she brought from the house after the killing, to which place she went immediately after her brother was shot, for water, and without knowing the nature or character of

his wounds or injuries. Witnesses differ as to whether there were two or three shots fired, but the weight of the testimony is in favor of three.

This is a general view of the facts, condensed from seven or eight hundred pages of testimony.

Upon it, the prisoner asked this instruction: "If the jury find from the evidence, that after the first shot was fired down the field, (if such shot was in fact fired), and when the defendant turned back to go down along the fence to the place where the homicide is alleged to have been committed, he did not know that Patrick Casady was approaching with a loaded rifle, with a view to an encounter, (if there was such an intent), by reason of the intervening fence, (if there was such an intervening fence,) and by the shadow of the trees, then the fact that defendant did go back to the place of homicide, is no evidence that defendant went to accept or seek a fight with deceased."

This was refused, and we think properly. It could only tend to mislead and confuse the jury. Not only so, but it placed the question of the prisoner's intent, in returning, upon one state of facts, which, though true, would not exclude the conclusion that he had in fact, the intent charged. Stripped of all extraneous matter, the instruction is, that if the prisoner did not know that deceased was approaching with a loaded gun, with a view to an encounter, then, the fact that he returned to the field, is no evidence that he returned to seek a fight; and yet, suppose he knew he was there, without the gun, might not the intention exist?

Or suppose he had no certain knowledge that the deceased was there, he might have returned with the general intention of having a difficulty with any one he might find, and, if so, the wrongful intent, general, and not particular in its object, would be material in considering the question of the prisoner's guilt; and then, when we consider what is said about the fence and the trees, the instruction becomes still further objectionable, and we are clearly of the opinion that it was properly refused.

This instruction was given at the request of the State: "To sustain the plea of self-defence, the defendant must show that Patrick Casady assaulted him, and that the assault was imminently perilous, and the danger to the defendant *actual* and urgent." The instruction is objected to on account of the use of the word *actual*. The very language employed, however, is sustained by the text of Wharton's Cr. Law, § 1020, and the authorities there cited, and also by the case of the State v. Thompson,^a 9 Iowa, 188, and, when properly understood, there can be no doubt of its correctness. The inquiry is, was the danger actual to the defendant's comprehension; not whether the danger existed in fact, not whether injury was actually intended by the deceased, but was it evident or actual to the prisoner, as compared with danger remote or problematical? Thus, to illustrate by the case supposed by PARKER, J., in the celebrated Selfridge's case^b (Whart. Hom. 407; 1 Bish. Cr. Law, 385), if Casady had rushed upon the defendant while engaged in his peaceable pursuits, with a pistol in his outstretched arm, using violent menaces against his life, and had approached near enough to wound or injure him, if the prisoner had shot before or at the instant the pistol was discharged, the danger to the deceased would have been *actual*, though it had turned out that the pistol held and owned by the deceased was loaded with powder merely, and that the real design was merely to terrify the prisoner. And yet, in that case, the danger in one sense was not actual, while it was in another. The general proposition, with proper qualifications and explanations, as stated by Baron PARKE (Rex. v. Thurston, 1 Den. C. C. 387), that "the guilt of the prisoner must depend on the circumstances as they appear to him," is not by any means denied. And this doctrine was elsewhere in the charge of the Court, very clearly and explicitly stated.

Defendant's error consists in placing an improper construction upon the word *actual*; a construction not warranted, and which other parts of the charge show the

^a *Ante*, next case. ^b *Ante*, p. 18.

Court did not intend. And the complaint made against the instruction, which stated the law upon the assumption that Casady fired the first shot under circumstances of supposed danger to his person, cannot avail; for it is based upon almost precisely a similar state of facts as that above given by PARKER, J. For the prisoner and for the State, this rule, as applied to danger believed to be evident, was clearly stated; and there is, in our opinion, no ground for concluding that the jury could justly or fairly have been misled by the language of which counsel now complain. And this view is more apparent, when it is remembered that this was a personal conflict, a conflict too, which the State claims was premeditated on the part of the prisoner. This claim leads to the consideration of the next error relied upon by the defendant.

This instruction was given at the request of the State: "If, therefore, the jury believe from the evidence, that the defendant brought on the difficulty by voluntarily returning to the vicinity of the deceased, with a deadly weapon, for the purpose of provoking a difficulty, his plea of self-defence would be of no avail; and, in that case, it would make no difference who fired the first shot." Another instruction of the same purport was given, except that the words "with the intent of having an *affray*" were used instead of "for the purpose of provoking a difficulty." And the correctness of these instructions really presents the question of most doubt in the case. After due reflection, however, we have concluded that the law was correctly stated. And it is upon this plain principle that one cannot willingly and knowingly bring upon himself the very necessity which he sets up for his defence. What we mean is, that if the prisoner, with a loaded weapon, sought the deceased with the view of provoking a difficulty, or with the intent of having an *affray*, and a difficulty did ensue, he cannot, without some proof of change of conduct or action, excuse the homicide upon the ground that the deceased fired the first shot. There then, is no pretence that the deceased put into exercise any intention (if such existed)

of withdrawing from the combat, which according to the hypothesis of the instruction he sought, but by seeking and continuing therein, he brought upon himself the necessity of killing his fellow man. Under such circumstances, the law will not hold him guiltless. 1 Hale, P. C. 482; 1 Hawk, P. C. 87; Bish. Cr. L. 648, 649;^a State v. Hill,^b 4 Dev. & Batt. 481; People v. Stonecifer, 6 Cal. 405. We remark in conclusion, on this point, that the use of the words "*a* difficulty" instead of *the* difficulty, cannot change the result, since the intention [instruction] in this case, as in all others, must be understood as applying to the facts developed on the trial, and not to a possible or hypothetical case.

It only remains to enquire whether the testimony warranted the verdict. We have examined it with all the care due a case of so great importance to the prisoner. The offence is among the gravest known to our law. The prisoner stands committed to the penitentiary for the term of fifteen years. There are, it must be admitted, some circumstances of great weight which render improbable the testimony of the principal witnesses on the part of the State. Of all these matters, however, the jury were the proper judges. The case seems to have been carefully tried and ably defended by the prisoner's counsel. There is much conflict in the testimony. If the witnesses present at the homicide are to be believed, it was entirely unprovoked, and the prisoner should have suffered even a severer penalty. The weight due to these statements was for the jury. And in a case turning upon so many conflicting circumstances, when so much depends upon the credibility of the several witnesses, when the jury, after a patient, and, as we are bound to presume, an impartial examination of the whole case, has felt compelled to conclude that the prisoner was guilty as charged, we could not, within any of the cases

^aVol. 1, 5th ed., §§ 869, 870.

^bThis is a very able exposition by Judge GASTON of the law of self-defence in mutual combat, and of manslaughter upon sudden provocation and heat of blood. *Post*, p. 199.

heretofore decided, or upon any fair rule, interfere with the action of the Court below in refusing to disturb the verdict.

Judgment affirmed.

NOTE.—With regard to the ruling upon that part of the instruction which states that the danger must be *actual*, it is doubtful, notwithstanding the eminent character of the Court, whether it finds much support in other cases. Without stopping to discuss the question here, it will be sufficient to refer to the note we have made to Shorter's case, *post*, from which it will appear that nearly all the American cases concur in the doctrine that it is sufficient if the danger appear to be imminent to the comprehension of a reasonable man, although it may not in fact exist. The fact that the law upon the point in question was elsewhere very clearly and explicitly charged, is stated in the principal case; but we are not informed with what degree of particularity or emphasis it was so laid down.

In the State v. Hill, 4 Dev. & Batt. 491, it was held that an erroneous instruction upon a particular point, is not cured by a correct instruction upon the same point couched in general terms.

The language complained of in the principal case seems to have been quoted by the Court in Thompson's case, *ante*, in a rather loose manner from § 1020 of Wharton's Criminal Law. In the caption of this section of Wharton, the proposition is stated that "*as a general rule, the danger must be actual and urgent.*" Under this caption, the first proposition stated is, "To make homicide excusable on the ground of self-defence, the danger must be *actual* and *urgent*." In support of this proposition, Mr. Wharton cites U. S. v. Vigol, 2 Dallas, 346; Com. v. Crause, 3 American Law Jour. N. S., 299, and Lander's case, 12 Tex. 462, *post*. The first of these cases was a trial for treason, the defendant having been actively engaged in the whiskey insurrection in Western Pennsylvania. In charging the jury, Mr. Justice PATTERSON said: "The counsel for the prisoner have endeavored, in the course of a faithful discharge of their duty, to extract from the witnesses some testimony, which might justify a defence upon the grounds of duress and terror. But in this they have failed; for the whole scene exhibits a disgraceful unanimity: and with regard to the prisoner, he can only be distinguished for a guilty pre-eminence in zeal and activity. It may not, however, be useless on this occasion, to observe that the fear which the law recognizes as an excuse for the perpetration of an offence, must proceed from an immediate and actual danger, threatening the very life of the party. The apprehension of any loss of property, by waste or fire; or even an apprehension of a slight injury to the person, furnish no excuse. If, indeed, such circumstances could avail, it would be in the power of every crafty leader of tumults and rebellion, to indemnify his followers by uttering previous menaces; an avenue would be forever open for the escape of unsuccessful guilt; and the whole fabric of society must, inevitably, be laid prostrate." It is needless to add a word to show that this case refers only to the imminence and character of the danger which is necessary to constitute such *duress* as will excuse a person in committing crime, and has no reference, unless in a very remote degree, to the

subject matter of Mr. Wharton's text. The second case quoted by Mr. Wharton, was a prosecution for murder in the Court of Oyer and Terminer of Northampton County, Pennsylvania. This case is not an authority for that part of Mr. Wharton's text, which states that the danger must be *actual*, but the reverse, as will appear from the following extract from the charge to the jury delivered by BANKS, P. J.: "It has been contended that the life of the deceased was taken by the prisoner in self-defence. The right of self-defence is a natural right. Therefore, a man may protect himself by slaying his assailant. This right is only lawfully excused in sudden and violent cases, where delay would put the party in immediate danger of the loss of life, or great bodily harm. The necessity must be urgent, the threatened violence great, and the danger immediate. In such a case, it is lawful to repel force by force instantly, even if the death of the assailant should be the consequence. In such a case, the party is not bound to retreat an inch, but may do himself justice speedily and effectually. When a man who is in the lawful pursuit of his own business is attacked by another, and the circumstances under which the attack is made are such that he has *well-grounded reason to apprehend* that the assailant intends to take his life, or to do him some serious bodily harm, he has a right to use all the means necessary to save his own life, and if he cannot retreat safely, or disable his assailant, he may lawfully kill him. If the attack is sudden, fierce and violent, so that an attempt to retreat or get out of the way, would only increase his danger, he may stand in his defence at once. The right only continues as long as the necessity exists. As soon as the imminent danger ceases, the right ceases." Com. v. Crause, 3 Amer. Law Jour. 299. It is seen that this language follows very closely some portions of the charge of PARKER, J., in Selfridge's case [*ante*, pp. 16-17], and the President in pronouncing the charge in this case, must have had that case in view.

It indeed, urges that the necessity which alone can excuse homicide in self-defence must be great, but it makes the *well-grounded apprehension* of the person assailed, and not the facts as they shall afterwards turn out to be, the test of that necessity. The third and last case cited by Mr. Wharton,—Lander's case, *post*,—as above stated, simply decides that a man whose life is threatened by another, may not lie in wait for that other and kill him unawares; and if he do so, it will be murder in the first degree; but that, on the contrary, there must at least be some demonstration creating a reasonable apprehension of present danger. The Court quotes the rule correctly from Mr. Wharton, as follows: "Or from the nature of the attack which he is forced to repel, the party killing must have had reasonable ground of belief that there was a design to destroy his life or do him some great bodily harm." Whart. Am. Cr. L., 258, 259-60, [1st Edition.] From this last quotation it will be seen that Mr. Wharton has elsewhere in his work on Criminal Law, stated the rule correctly. Indeed, it was not to be inferred that a writer of his research could have failed to do so. Accordingly, we find a little further on, at § 1026, of his Criminal Law, the following proposition stated: "If the apprehension of an immediate and actual danger to life be sincere, though unreal, it is in like manner, a defence." This proposition is as inaccurate as that quoted in Thompson's case, but the error lies in precisely the opposite extreme, and it is equally unfortunate in not being supported by authorities. The only

respectable American case we have found, which supports the rule as thus stated, is that of Grainger—a case which has been frequently overruled, explained or discountenanced. See Grainger's case, *post*, and note to the same. The proposition as stated is correct, with this addition: *Provided the apprehension be founded on reasonable grounds*—such grounds as would convince a reasonable man—a man of ordinary intelligence and courage. See the cases collected in SUBDIVISION D., *post*. We are not able to see how these two propositions of Mr. Wharton—that of § 1020, that the danger must be *actual*, and that of § 1026, that it will be sufficient if the *apprehension* of immediate and actual danger be *sincere*, can be reconciled with each other, or how either of them can be reconciled with the correct law on the subject, as laid down in Selfridge's case, Shorter's case, Logues' case, Maher's case, Campbell's case, Pond's case, and many others. And while the writer feels that it would be preposterous to set up his individual judgment against that of the eminent Court which decided the principal case, yet he would venture to suggest that if one man may interpret the meaning of the word “actual” differently from the learned Court, another may also; and if a single lawyer may not be able to see that the word “actual” means *apparent*, neither may a jury of unskilled men be able to see it; and hence, that the charge of the district Judge in the principal case, may actually have misled the jury, although it ought not to have done so. And although in two cases decided in the New York Court of Appeals, Sullivan's case, *ante*, and Lamb's case, *post*, expressions equally inaccurate with that in the principal case, have been held not erroneous when taken in connection with other parts of the charge; yet it is doubtful whether the instruction complained of would have been sanctioned by the Court which decided Pond's case, *post*, or Meredith's case, *post*, or Maher's case, *post*. And we have seen that it is founded on the dictum of a text writer, which is not supported by the authorities quoted by him in its favor.

THE STATE v. JOHN KENNEDY.

[20 IOWA., 569.]

Supreme Court of Iowa, June Term, 1866.

RALPH P. LOWE, *Chief Justice*.
 JOHN F. DILLON,
 CHESTER C. COLE, } *Justices*.
 GEORGE G. WRIGHT,

DEFENCE AGAINST NON-FELONIOUS ASSAULT—DEADLY WEAPON MAY NOT BE USED.

1. A man may repel force by force in the defence of his person, habita-

tion or property, against one who manifestly intends, by violence or surprise, to commit a felony against either; and if, in making such defence, he takes life, the killing is justifiable. But if the assault is not felonious, and there is no reason for a belief on the part of the person assailed, that the danger is actual and imminent, he is not justified in using a deadly weapon in a deadly manner. [Acc. Thompson's case, *ante*; Benham's case, *post*; Stewart's case, *post*. Nor to repel a non-felonious trespass upon property: Harrison's case, *ante*, and cases cited.]

2. Sections 4442 and 4443 of the Iowa revision of 1860, do not change the common law rule as above stated.

Appeal from Dubuque District Court.

The defendant and his brother Thomas were jointly indicted and tried for the murder of Thomas Dolan in Dubuque, on the 13th day of June, 1865. Plea: Not guilty. Verdict against both, of manslaughter. As to Thomas, the Court sustained a motion for a new trial. The motion of John for a new trial was overruled, and he was sentenced to five years imprisonment in the penitentiary, and to pay a fine of \$100 and costs. From this John appeals. The only error assigned relates to the charge of the Court on the subject of self-defence.

The deceased, John Dolan, kept a saloon in Dubuque. He was killed by being stabbed with a knife in the abdomen. An outline of the material features of the case, so far as relevant to this appeal, will appear from the testimony of Ryan and Fenton, who were at Dolan's at the time the difficulty began. Ryan testified that the Kennedys came into Dolan's between ten and eleven o'clock at night. At this time Dolan and a stranger, and Ryan and Fenton were the only persons present. "The first I knew," says Ryan, "there was a fuss between the Kennedys and Dolan—a quarrel. When the fuss began, the stranger ran out of doors. I was going out after him, when one of the Kennedys (Thomas) came right against me. I caught hold of him and took him out of doors. He did not say a word nor attempt to get away from me. I told him he ought to be ashamed to beat a man in his own house. I heard a voice inside saying, *I would get the very same*. Fenton had before left and gone to the corner of the street. When I heard this

threat, I got scared, and let this man (Thomas Kennedy) go. After I left the house, I heard the cry of 'murder' three times. It appeared to be Dolan's voice." He then testifies that, with others, he returned, and returning met the Kennedys, one of them (John) with blood upon his face, and Dolan was found behind the counter insensible from the wound he had received.

On cross-examination, the witness cannot say that Dolan was drunk, and says the scuffling between Dolan and Kennedy occupied ten or fifteen minutes. Fenton testifies that Kennedy came in; that one of them was very noisy; that Dolan endeavored to have him keep quiet; that a dispute arose; that "Dolan got out of his chair and struck one of them; Dolan went towards the counter; the Kennedys followed him up. They fussed a little while together," and the witness left. He afterwards says that Dolan "followed up the man he struck; that they pursued Dolan, fussing together; blows were struck; *noticed nothing in the hands of either of the men.*" On cross-examination, he says that Dolan hit the man in the face, but did not observe that he had any glass in his hands.

Dolan, in his dying declarations implicated *both* Kennedys. Other evidence, which it is not necessary to notice, was given on behalf of the State.

The defendants were examined as witnesses on the trial; each for the other. John testified that a dispute arose; that Dolan said to Tom, "You lie," and struck Tom on the face, and afterwards struck him (John) with a glass across the face. And Thomas gave substantially the same testimony in behalf of John. The Kennedys in their evidence did not deny the stabbing; but John claims that Dolan was getting the advantage of him in the scuffle, and that he used his knife in self-defence. Dolan was stabbed on Saturday evening; and from the wound thus received, died on the Monday morning following.

F. E. Bissell, Attorney-General, for the State; *W. J. Knight*, for the defendant.

DILLON, J. The eighth section of the Court's charge, (the only portion excepted to by the appellant) was this: "A person may repel force by force, in defence of his person, habitation or property, against one who 'manifestly intends or endeavors, by violence or surprise, to commit a known felony upon either; and if a conflict ensue in such case, and life is taken, the killing is justifiable. It must be proved that the assault was imminently perilous. And unless there be a plain manifestation of a felonious intent, no assault will justify killing the assailant. A party is not compelled to flee from his adversary, who assails him with a deadly weapon before he can justify the homicide. The assault may be so fierce, as not to allow the party assailed to yield a step without manifest danger to his life, or enormous bodily injury. In such case, if there be no other way of saving his own life, he may, in self-defence, kill his assailant. But the rule of law is different when the attack is not felonious. * * * [The omission here indicated occurs in the original report.—Eds.] An assault, without a weapon of any kind, by a quarrelsome and violent man upon another, when there is no reason for the belief by the person attacked, that his person was in danger of death or great bodily harm, but that an ordinary battery was all that was intended, and all that he had reason to fear from the acts of his assailant, the party assailed has no right to take the life of such assailant."

It will be perceived that this portion of the charge was taken from the judgment of the Court, in the State of Iowa v. Thompson,^a 9 Iowa, 188. That it is the law, unless changed by statute, admits of no doubt. Fost. 273, 277; 1 East P. C. 272, § 44; 273, § 45; 221, § 7, p. 3;^b Hawk. P. C., § 23;^c Id. 87, § 13.

^a *Ante*, p. 92.

^b This last citation is evidently a misprint.—Eds.

^c The citations of Hawkin's Pleas of the Crown in this case, are evidently to one of the early additions. The last edition—that of Curwood, London, 1824,—entirely transposes the arrangement of the first volume. This edition appears to be generally in use in this country. Therefore, in

Upon the law of homicide, there is no higher authority than Mr. Justice FOSTER. By no other writer have the general principles of self-defence been so clearly and concisely laid down. Fost. 273, 277. Speaking of instances like the present, where death has resulted in a case of mutual conflict, he sums up the law as follows: "He, therefore, who in a case of mutual conflict, would excuse himself upon the foot of self-defence, must show that before a mortal stroke was given, he had declined any further combat, and retreated as far as he could with safety; and also that he killed his adversary through *mere necessity*, and to avoid *immediate death*. If he failed in either of these circumstances, he will incur the penalties of manslaughter." Fost. ch. 3, p. 277.

Mr. East lays down the rule somewhat less rigid, as follows: "He must have no other possible, or, at least probable, method of escaping his own immediate destruction or great bodily harm." 1 East P. C., p. 221, §7. And the rule as thus stated by Mr. East, was the one adopted by this Court, in the case of *The State of Iowa v. Thompson*, above cited; and the same rule prevails generally in this country. Further than this, the law cannot be relaxed without ignoring or disregarding the sanctity of human life; and further than this, we have no disposition to go. We reaffirm the case of *The State of Iowa v. Thompson*, *supra*.

The defendant contends, however, that the rule as stated in the case last cited, has been changed by §§ 4442, 4443 of the revision. These provide as follows: §4442, "Lawful resistance to the commission of a public offence may be made by the party about to be injured, or by others." §4443, "Resistance sufficient to prevent the offence may be made by the party about to be injured—1. To prevent an offence against his person. 2. To prevent an illegal attempt by force to take or injure property in his lawful possession."

The defendant's counsel argue thus: "If the offence citing Hawkins, at least, the first volume, the edition should be stated.—Eds.

cannot be prevented except by the killing of the person attempting to perpetrate it, the killing will be justifiable. The statute does not limit the right to resist to a *known* felony, but gives the right to make a *sufficient* resistance, which includes misdemeanors as well as felonies. Revision, §4218. The nature of the resistance, however, must as before, have regard to the nature of the offence about to be committed. Under the statute, I may slay a robber or a burglar in my dwelling in the night time, as I might at common law. But if one attempt to commit an ordinary assault and battery upon me, or take my goods, or cut down my timber, as a *trespasser merely*, or is simply attempting to pick my pocket, [1 Hale, 488,] though I may justify beating him so as to make him desist, and sufficiently to accomplish the purpose, yet if I make use of a deadly weapon and slay him, I will not stand justified in the eyes of the law. 1 East P. C., 272, §44; 1 Hale, 485, 486; 1 Hawk. P. C., ch. 28, §23^d; Regina v. Smith,^{*} 8 C. and P., 160, per BOSANQUET, J.; Wild's case,^f 2 Lew. C. C., 214.

The deceased had no weapons. Every person upon whom he could rely for help, had fled the room alarmed and panic stricken. The appellant knew his brother was near, even if he was not actually present, aiding and

^d See preceding note. ^{*} See the next case.

^f This case was tried at the Liverpool Spring Assizes, 1837. The prisoner was indicted for manslaughter. It appeared that the deceased had entered the prisoner's house in his absence. The prisoner, on returning home, found him there, and desired him to withdraw, but he refused to go. Upon this, words arose between them, and the prisoner becoming excited, proceeded to use force, and by a kick which he gave to the deceased, caused an injury which produced his death.

ALDERSON, B.—“A kick is not a justifiable mode of turning a man out of your house, though he be a trespasser. If a person becomes excited and being so excited, gives to another a kick, it is an unjustifiable act. If the deceased would not have died but for the injury he received, the prisoner having unlawfully caused that injury, he is guilty of manslaughter.”

In Fenton's case, 1 Lewin C. C. 179, TINDAL, Ch. J., said, “If death ensues as the consequence of a wrongful act, an act which the party who commits it can neither justify nor excuse, it is not accidental death but manslaughter.” See as to homicide by misadventure and involuntary manslaughter, Benham's case, *post*.

assisting him. The jury has found, under appropriate instructions, that the resort to a deadly weapon was not necessary. That finding is in our judgment most clearly supported by the evidence. That the appellant was, at least, guilty of manslaughter, we entertain no doubt. *The State of Iowa v. Decklots*, 19 Iowa, 447. The most that deceased did, was to commit an ordinary assault, one accompanied with no imminent bodily danger, and which the Kennedys had done much to provoke. The jury should not have been told, as the appellant's counsel has argued they should, that if John Kennedy could not otherwise protect his person from such an assault, he was justified in killing Dolan. *The State of Iowa v. Neeley*, 20 Iowa, 108;^a *State of Iowa v. Decklots*,^b *supra*. Human life in Iowa is not so cheap, nor its legal tenure so precarious as such a doctrine would make it.

Judgment affirmed.

^a *Ante*, last case.

^b In *Decklots*' case, in the course of a very able opinion, DILLON, J., said:

Finally, it is urged that the verdict is against the weight of evidence.

That the defendant killed the deceased is not denied. It was claimed by the defendant, upon the trial, that the killing was excusable homicide, because done in self-defence, or in defence of his property and home. Upon any view of the evidence, even taking the evidence adduced by the defendant, this theory is wholly inadmissible.

The only doubt which could exist, would be, whether the real offence was, as the jury found, murder in the second degree or manslaughter. An outline of the material facts may thus be given: The defendant kept a saloon and grocery store in Cedar Rapids. The offence was committed on the night preceding Christmas, A. D., 1864, at ten or eleven o'clock, P. M. The deceased was a young man, and he and some of his companions were out for a spree, and were more or less under the influence of liquor. In the earlier portion of the evening, they drank at the defendant's saloon. Others were in there at the same time. The deceased and his party left, and visited other saloons, and drank. The deceased, in the course of the evening, heard that the defendant had accused him of stealing tumblers when he was in his saloon; and he, with three other persons, started for the defendant's premises. It was now quite late at night, near eleven o'clock. The defendant's house, (one part of which was a grocery store, another, a saloon, with counter, shelves, etc., and another, the place where the defendant and his family resided), was still open. The testimony is conflicting as to whether the deceased and his associates broke open the doors and forced their way in. It was also conflicting in some other respects. The testimony of Maxwell, who happened to be in the house, and

not in any way connected with the disturbance, is, perhaps, substantially correct. He says, that the deceased and his companions, after getting in, went up to the counter in the middle room, and called on the defendant for something to drink. Defendant said, "You go away; you cannot get any drink from me. You stole my tumblers." Then Akers, the deceased, called him a liar, and a damned liar, and said, "I put down a dollar bill and got no change." Akers wanted his change, and defendant said he had got it. Defendant was at end of counter. When Akers called defendant a liar, they had their hands against each other's shoulders. They separated, and defendant went behind the counter. Hunter, (one of the associates of the deceased,) took Akers back on the floor. Defendant repeatedly told Akers to go away. Akers denied stealing the tumblers, and said the other boys did it. Neither Hunter nor the others did or said anything, until Hunter remarked: "It is too bad to accuse our boys of stealing." Deceased and defendant called each other liars. Then Akers made at defendant, and the latter pushed him away. Akers tried to get at defendant. They were close enough to put their hands on each other. Hunter took hold of Akers, and pushed him back, and said, "You must not have any fuss." Defendant then stepped behind the counter, got his pistol down, when Akers made at him. Defendant then said to Akers, "I will show you if you don't." Defendant reached the pistol over the counter three or four times. Akers then stepped back, pulled off his coat. The next I saw, he was shot, and he fell, and died.

Akers had no weapons of any kind, and he and the defendant were about the same size. After the defendant shot, I heard him say, "I told you that is the way I do." Koke, (one of the associates of the deceased), testified, among other things, "I first saw the pistol in the defendant's hand; he reached across the counter by making two or three motions, and levelled his aim two or three times, so as to bring it level. Akers was three feet from the counter. The counter was eighteen inches wide, and the defendant was behind the counter when the shot was fired."

Mrs. Decklotts testified, that the deceased did steal a tumbler, and put it in his pocket; that the door was locked when the party returned; that deceased and his party (except Hunter), broke the lower bolt, and forced their way in; that Akers first commenced about the tumbler; that defendant did not accuse him of stealing it, but simply said it was gone; that somebody had it. Akers then struck the defendant, and hit his arm or shoulder; pulled off his coat, and went at him again. Defendant had told him two or three times to leave the house. Akers made a motion, (being near the counter, and defendant behind it,) as though he wanted to get something out of his bosom, "as though he was taking something out of his bosom," and then it was that the shot was fired. Both parties were excited and mad. Another woman, (a German), an inmate of the house, but who did not understand what was said, testifies as to the motion of the deceased toward his bosom. But the other witnesses say nothing of this. Mrs. Decklotts also testified, that about three-quarters of an hour before the shooting, she heard Akers, who, with one other person, was outside, say "he was going in, and was going to clean out and kill the d——d Dutchman." This is not corroborated by any other witness.

Some of the State's witnesses deny that there were any blows passed

prior to the shooting. It was proved that the defendant was accustomed to keep the pistol behind a glass, inside of the counter.

It is not a little difficult, frequently, even where the testimony is not conflicting, to determine what shall be considered murder or manslaughter. This is particularly difficult where the evidence, as in the present case, is conflicting, or the facts complicated. The boundaries between murder and manslaughter cannot always be distinctly ascertained and traced. The rules of law are plain, but their application difficult. When death ensues from the sudden transport of passion, or heat of blood, upon *reasonable provocation*, without malice, the offence is manslaughter, but not murder. 1 Russ., 580; 1 Hale, 466; 4 Bla. Com., 191.

What is *reasonable and adequate provocation*, which in such cases is taken to extenuate the killing from murder to manslaughter, is a question upon which it is obvious, different opinions will, in many instances, be entertained.

Considering here the deadly nature of the weapon used; that the deceased was without weapons; that the defendant was in no great, if, indeed, in any danger of his life or serious bodily harm; that he was several feet distant from the deceased, and protected by a counter from any assault that he might make; we say, if these be considered to be the essential facts, it is a plain case of murder, as distinguished from manslaughter. But if we should regard it as established, that the deceased and his party had threatened violence against the defendant; had forced open his house to provoke a contest; that defendant believed that deceased, in any contest with him, could rely upon the sympathy and aid of his companions, and that they were sufficient to overpower him and his friends; that the defendant, when he shot, also believed that the deceased was reaching in his bosom for a weapon, and that he thereupon shot instinctively and not deliberately, the pistol lying there, and not having been purposely provided; these circumstances, in connection with the insolent behavior of the deceased, would go very far toward, if indeed, they would not be sufficient, to reduce the offence to manslaughter.

Under instructions which laid down the law correctly, but not as fully and as pointedly as would be desirable, the jury have found the offence to be murder in the second degree, and not manslaughter. Taking the whole evidence together, we think this was a correct conclusion. The danger to the defendant was *really* nothing, and was not even *apparently* imminent and great. His use of a loaded pistol, under these circumstances aimed at the breast of the deceased, the natural result of which would be to take life or inflict great bodily injury, indicates very strongly that this was his intention, especially if the testimony of his deliberateness of aim be credited; and if so, the offence was murder. It would have been a very different question, if the weapon used had been one not likely to endanger life, or if the deceased had himself been seen to be armed with a dangerous weapon, or if his companions had been counseling and stimulating him to make an assault upon the defendant, instead of endeavoring to dissuade him from it.

The occurrence is truly a most unfortunate one. The conduct of the deceased was highly blameworthy. He it was that provoked the difficulty, instigated, doubtless, by the liquor which he drank, and to the use of

which he became a victim. The only mitigation his conduct finds, if it finds it at all, is in the fact that he was intoxicated, and in part by liquor sold him by the defendant. It would not do to hold that a saloon keeper may sell a man that which steals away his senses, overthrows his judgment and clouds his reason, makes him boisterous, quarrelsome and offensive; and then, himself being in no serious danger, shoot him dead because he is unreasonable, insulting and quarrelsome.

The Court, however, under the circumstances, reduced the *quantum* of punishment from sixteen to ten years in the penitentiary.

STATE v. BENHAM.

[23 IOWA, 154.]

Supreme Court of Iowa, June Term, 1867.

RALPH P. LOWE, *Chief Justice.*

JOHN F. DILLON,
CHESTER C. COLE,
GEORGE G. WRIGHT, } *Judges.*

NON-FELONIOUS ASSAULT—DEFENCE AGAINST THREATENED DEATH OR ENORMOUS BODILY HARM—ASSAILED MUST ENDEAVOR TO RETREAT BEFORE KILLING—ORDINARY ASSAULT NO EXCUSE FOR KILLING—IF DEFENDANT SEEK THE QUARREL, WHAT—RIGHT TO KILL IN DEFENCE FOUNDED IN NECESSITY ONLY—KILLING TO PREVENT ENORMOUS BODILY HARM JUSTIFIABLE—HOMICIDE BY MISADVENTURE.

1. Where, in a prosecution for murder, it appeared that the defendant was a boy only sixteen years of age, that the deceased was a large and strong man, that they accidentally met and engaged in a dispute, in which the deceased became angry and threatened to "thrash" defendant, and advanced upon him for that purpose, with an ox-gad, when he was mortally wounded by the discharge of a gun in the hands of the defendant, *it was held*, that the physical capacity of the parties, the size and character of the ox-gad, the manner in which the deceased threatened to use it, and in which he entered upon the execution of the threat, were important considerations for the jury, in determining the question whether defendant, in what he did, acted within the law of necessary self-defence, and that, for this purpose, the jury should have been instructed to consider these circumstances. [See as to the relative strength of the parties, *Selfridge's case, ante*; *Copeland's case, ante*; *Thompson's case, ante*.]

2. If all the circumstances show an intention on the part of an assailant to take the life of the assailed, or to do him some enormous bodily injury,

then the person assailed may lawfully take the life of his assailant, provided he uses all the means in his power, otherwise, to save his own life or prevent the threatened harm; such as retreating, if the assault be not so sudden, fierce and dangerous as to render retreat unsafe, or, if retreat is not practicable, then by disabling, instead of killing, his adversary, if it is within his power simply to disable him. [Acc. PARKER, J., in Selfridge's case, *ante*, pp. 17, 18; John Doe's case, *ante*; Regina v. Smith, *post*. And see note to Selfridge's case, *ante*.]

3. But if the person assailed had no reasonable ground to believe that he was in danger of death or great bodily injury, but, on the contrary, that his assailant only intended a simple or ordinary non-felonious assault, simply intended to chastise or whip him, then the person assailed would not be justified in taking the life of his assailant, because it might be regarded as dishonorable or disgraceful not to stand his ground. [Acc. Selfridge's case, *ante*; Thompson's case, *ante*; Stewart's case, *post*; John Kennedy's case, *ante*. Nor to repel a non-felonious trespass upon property: Harrison's case, *ante*, and citations.]

4. Nor can a defendant justify his act under the plea of self-defence, if he sought the deceased with a view to provoke a difficulty or bring on a quarrel. [Acc. Selfridge's case, *ante*; Neeley's case, *ante*; Stewart's case, *post*; Adams' case, *post*; Evans' case, *post*. And see Hinton's case, *ante*, and note, and Baker's case, *ante*.]

5. The law regards human life as the most sacred of all interests committed to its protection; and there can be no successful setting up of self-defence, unless the necessity for taking life is actual, present, urgent—unless, in a word, the taking of his adversary's life is the only reasonable resort of the party to save his own life, or his person from dreadful harm, or severe calamity, felonious in its character.

6. Where, in a prosecution for murder, the Court instructed the jury, that in order to make out self-defence, the taking of the life of the deceased must have seemed to the defendant reasonably necessary *to save his own life*, the charge was held to be erroneous, because it omitted to give the defendant the benefit of the plea of self-defence, if he took his assailant's life to save himself from *imminent and enormous bodily injury*. [Acc. Burke's case, *post*; Maher's case, *post*.]

7. When an instruction relating to the law of self-defence, is so drawn, that when applied to the particular facts of the case, it might mislead the jury, it will be held erroneous. For an example of this kind, see the opinion.

8. The accidental killing of another, when done in the prosecution of an unlawful act, is not excusable homicide; but if one doing a lawful act, and using proper precaution to prevent danger, accidentally kill another, the law excuses the killing.

9. If one point a loaded gun at another under circumstances which would not justify him in shooting the latter, who seizes it, and struggles for it, to save himself from the menaced injury, and in the struggle the gun is accidentally discharged, causing the death of the person at whom it was pointed, the other cannot claim that the homicide was justifiable.

Aliter, if he had pointed the gun at the deceased, and it "went off" under circumstances in which it would have been lawful for him to have discharged it in self-defence.

The indictment charges the defendant with the murder on the 11th day of October, 1866, of one Z. T. Shepard. Plea: Not guilty. Verdict: Guilty of manslaughter. Judgment: fine and four years imprisonment in the penitentiary. The case is somewhat peculiar, and is so largely influenced in its determination by its special circumstances, that it is necessary, briefly, to state these.

The deceased (Shepard) came to his death by a shot received on the 11th day of October, 1866, in the leg, near the groin. The shots taken from the wound by the surgeon "were of small size, such as are used for shooting birds." Shepard lived six days after the wound was inflicted. He was conscious of its fatal character at a period very soon after it was received. During this period, he made two different statements, which were received as dying declarations, in relation to the manner in which he was wounded. One of these statements was given in evidence by the State, the dying declarations being testified to by Mrs. Shepard, widow of the deceased. The other of these statements was made to Mrs. Hunt, she being introduced as a witness by and in behalf of the defendant. Mr. Hunt, her husband, heard the same statement testified to by his wife, and gave testimony substantially the same as his wife. The only evidence inculcating the defendant, is these dying declarations. Concerning these dying declarations, there is some substantial difference between the testimony of Mrs. Shepard, on the one hand, and Mrs. Hunt (supported by her husband), on the other. The statements made by the deceased, and given in evidence, respectively, by Mrs. Shepard and Mrs. Hunt, relate to different times: that is, these witnesses are not referring to the same conversation. Before giving the substance of these different statements, it is proper to allude to some other facts in relation to which there is but little, if any, dispute: It

was shown that the defendant was just one month over sixteen years of age, weight and size not appearing in the record. He was living with his father. The deceased, it was testified, "was about five feet ten inches high, weighing not quite one hundred and seventy pounds, was about thirty years of age, a good, stout, able man, as much so as any man in the country, slow temperament, slow to talk, not much to say, but when he spoke, meant it, did not often get angry, but high-tempered when mad."

The farm of the deceased is upon one side of a creek; that of the defendant's father on the other. The creek is about one rod in width, and from two to three feet deep. On the day deceased was shot, he was at the ford of the creek with an ox team, loading sand.

The following is the substantial portion of the dying declarations given in evidence by Mrs. Shepard:

He (Shepard) told me he was at creek loading sand. Benham (the defendant) came on opposite side with gun; Benham commenced on him about cattle; they had a few words. Benham said cattle were troubling him, and if they continued he would dog them. Shepard told him to dog them as much as he chose, but not to cross the creek and drive them off with a horse. Benham told him (Shepard) that he (Shepard) had shot cattle, and now it was his (Benham's) turn. Shepard told Benham he had shot no cattle; if he told him so again he would whip him. Benham repeated that he had shot cattle, and he would shoot too, and Shepard started across the creek toward him; as he was almost across the creek, Benham met him with his gun, and pointed it at his (S.'s) breast. Shepard sprung out of the water, took hold of the gun to push it down, and it was discharged into his thigh. Shepard said he held on to the gun as long as he was able; asked Benham to help him across the creek; Benham would not; asked him to take care of oxen so they would not break the wagon; Benham would not; asked B. if he would shoot again if he would let go the gun; B. said he would not. He let go the gun; B. put the gun

on his shoulder and ran off; said he never struck B.; Shepard said he did not tell B. what he would whip him (B.) with; that he had a stick in his hand; that it was a willow he was driving cattle with; went over with the stick; said he did not strike B.; "did not lay the weight of his hand on him" (as stated to Mrs. Dillingham).

Mrs. Hunt testified that the deceased told her "that he should die, etc.; that he went to the creek after some sand; Benham came along; Shepard told Benham not to run off his cattle as he had been doing; Benham said he had as much right to run off his cattle as he had to shoot other's cattle; Shepard told him if he told him that again he would go over and thrash him; B. said he (S.) had shot cattle, and he could prove it; Shepard said he was so mad that he plunged into the creek with the intention, as he told B., twice, to give him a G—— d——d thrashing; as he came to the shore, B. told him to stand back. When he came up, he took hold of the gun, and, while he had hold of it, the gun went off. He thought B. might have helped him home."

Mr. Hunt's evidence is substantially the same: He represents Shepard as stating that he (Shepard) first hallooed over to B. about the cattle; that when B. reiterated the charge that S. had shot cattle, that S. said "he bounced into the creek as quickly as he could; swore he would give him a G—— d——d thrashing; B. told him to keep back; B. pushed him back with the gun, when he grasped the gun with both hands; S. pulled one way, B. the other, when the gun went off; said he did not know how the gun went off, only it went off in the struggle; said nothing about asking B. to help him or the oxen, or about his running off.

Defendant produced a witness (Dodd) who testified, "that on the day of the shooting, he heard B.'s father send him to drive away cattle; heard bells; B. was gone about an hour; suppose he took gun to drive cattle."

It was testified by a witness (Davis) that the "ox-gad" used by the deceased on the day he was shot, was about six or seven feet long, three-quarters of an inch

thick; think it was elm, not peeled; I saw it; it was about an inch thick at the butt; it was green."

The above is the substance of all of the material evidence in the case

Defendant appeals. The questions made and decided appear in the opinion of the Court.

E. W. Eastman, for the appellant; *Henry O' Connor*, Attorney-General, (with whom, *J. H. Bradley*, District-Attorney,) for the State.

DILLON, J.—It is not denied, that the fatal meeting between the deceased and defendant took place at the creek, and on the day named in the indictment. *How much* the dying declarations establish, is the principal question arising upon the evidence.

The deceased, at no time, charged the defendant with having purposely discharged the gun at him. He complained of his conduct in other respects, such as refusing to assist him; but upon repeated examinations of the evidence, we do not discover that he even stated that the defendant intentionally shot him. Had he so believed, he would most likely have so declared.

There is no reason to question, upon the evidence as it stands, that the meeting at the creek between Shepard and young Benham was accidental. Shepard was there hauling sand, and Benham happened along with his gun, having been sent out to drive away the cattle. Whether the cattle were in view at the time the gun went off, does not appear. On the merits, the defence must rest upon one of two grounds.

1. That the fatal shot was given in necessary self-defence. This assumes that it was intentional, but justified from necessity.

2. That it was purely accidental, and under circumstances to which the law will ascribe no guilt.

Which of the two commenced the altercation or dispute about the cattle is not clear. But it is clear, from the testimony of the wife and the Hunts, that the deceased made the first threat of an assault; that he

either had in his hand, or what is more probable, as he was loading sand, took up the ox-gad, with which to execute the threat; that he was so angry that he plunged into the stream, threatening to thrash the boy, and that he crossed it for this purpose.

So far, there is no dispute. Now, it is to be recollected, that the deceased was a large and strong man, weighing about one hundred and seventy pounds, and the defendant a boy of sixteen years of age. It is probable, that, physically, the deceased was much the superior of the boy. The physical capacity of the two persons would be an important consideration for the jury in determining the question, whether the defendant, in what he did, was within the law of necessary self-defence. So, the size and character of the ox-gad or weapon which the deceased seized or had, the manner in which he threatened to use it, and in which he entered upon the execution of that threat, would also be important considerations for the jury. Now, none of these circumstances are in any manner alluded to in the charge of the Court. The attention of the jury should have been called to these circumstances, that is to say, to the nature and character of the advance of the deceased upon the defendant. And the jury should have been directed to ascertain, whether all the circumstances in evidence denoted or showed an intention on the part of Shepard to take the life of Benham, or to do him some enormous, some dreadful bodily harm; if they did, then Benham, in self-defence, might lawfully take the life of his assailant, provided he used all the means in his power, otherwise, to save his own life, or prevent the intended harm, such as retreating, if the assault was not so sudden, fierce and dangerous, as to render retreat unsafe, or if retreat were not practicable, then, by disabling his adversary, instead of killing him, if it were within his power simply to disable him.

And to make the above more plain to the jury, it would be well to add, that if the defendant had no reasonable ground to believe that he was in danger of

death or great bodily harm, but had reasonable ground to believe that the deceased only intended a simple or ordinary non-felonious assault, simply intended to chastise or whip him, this would not justify the defendant in resorting to the extreme measure of taking the life of his assailant; and if, under such circumstances, the defendant intentionally fired the gun, he would be guilty of, at least, manslaughter. Nor would defendant be justified by the laws of the land in shooting at another, if he had no reason to suppose himself in danger of death or enormous bodily harm, merely because it might be regarded as disgraceful or dishonorable not to stand his ground.

Nor can the defendant get the benefit of the plea of self-defence, if he sought the deceased with a view to provoke a difficulty or to bring on a quarrel. *State v. Neeley*,^a 20 Iowa, 108.

The law regards human life as the most sacred of all interests committed to its protection, and there can be no successful setting up of self-defence, unless the necessity for taking life is actual, present, urgent,—unless, in a word, the taking of his adversary's life is the only reasonable resort of the party to save his own life, or his person from dreadful harm, or severe calamity, felonious in its character. *State v. Thompson*,^b 9 Iowa, 188; 20 *Id.*, 569.^c

In the main, the charge of the Court was very correct, but it was defective in the particular above suggested; it was not closely enough applicable to the case.

The case was very peculiar, and we may add, in view of the evidence, not a little difficult. There was special necessity for great care in the instructions to the jury. In addition to omitting to allude to the respective sizes and ages of the defendant and deceased, the character of the weapon used by the deceased, and the nature of the advance or assault by the deceased, the charge of the Court, was, in one or more instances, erroneous or calculated to mislead the jury.

^a *Ante*, p. 96. ^b *Ante*, p. 92. ^c *John Kennedy's case, ante*, p. 106.

Thus, in the eighth instruction, the Court charged that in order to make out self-defence, the taking of the life of the deceased must have seemed to the defendant, reasonably necessary to save his own life; thus omitting to give the defendant the benefit of the plea of self-defence if he took his assailant's life to save himself from imminent and enormous bodily injury, felonious in its character. See on this subject, *State v. Kennedy*,^d 20 Iowa, 569; *State v. Thompson*,^e 9 Iowa, 188; *State v. Wells*,^f 1 Coxe, (N. J.) 424; *State v. Decklotts*,^g 19 Iowa, 447; *State v. Neeley*,^h 20 Iowa, 108.ⁱ

Then, again, the twelfth instruction is quite faulty, especially in its application to the circumstances of the case. It contains this language: "Proof of angry words, actions or gestures, expressions of contempt without blows, without any assault, would not be sufficient to reduce the crime to manslaughter. But if the assault is made and death ensues to the party assaulting, and there is no evidence of deliberation, it would be manslaughter, and if the assault was violent, and the instrument or weapon used was a dangerous weapon, as a loaded gun, and such assault was under such circumstances as would lead a man of ordinary prudence to fear for his life, then, if death follows to the assailant, the killing would be justifiable.

This instruction to have any application, must refer to the assault of the deceased upon the defendant. But the deceased had no loaded gun. It was the defendant who had the gun. By the use of this illustration of a deadly weapon in the hands of an assailant, it would be very easy, if not natural, for the jury to construe this instruction, as referring to an assault by the defendant with a loaded gun upon the deceased. Such a state of facts is just the reverse of the case before the jury.

If the jury should believe that the defendant dis-

^d *Ante*, p. 106. ^e *Ante*, p. 92. ^f *Post*.

^g *Ante*, note to John Kennedy's case, p. 112. ^h *Ante*, p. 96.

ⁱ See also Burke's case, *post*, where the same ruling is made; also Maher's case, *post*.

charged the gun intentionally, the above sufficiently refers to the legal principles upon which the plea of self-defence must rest. But, suppose the jury shall believe that the gun was not intentionally discharged by the defendant; what is then the law of the case? It is this: Accidental death, wholly to be excused from all guilt, must be caused in the doing of some lawful act.

The law, in its solicitous regard for human life, requires all reasonable and due caution in the use of dangerous articles or instruments. If one in doing a lawful act, without any intention of bodily harm, and using proper precaution to prevent danger, unfortunately happens to kill another, the law excuses the killing. Fost. 258; 1 East P. C., ch. 5, §40, p. 266; Id., ch. 5, §§8, 36; 1 Russell on Crimes, 657, 658; Whart. Cr. L.,¹ (2d. ed.,) 382, 385.

If, therefore, the defendant pointed a loaded gun at the deceased, under circumstances which would not have justified him in shooting the deceased, and the deceased seized it and struggled for it to save himself from the menaced injury from it, and in the struggle it went off without being purposely shot off by the defendant, the latter could not claim that the homicide was excusable. It would be manslaughter; and the circumstances relied on wholly to excuse the defendant, would be regarded by the Court in affixing the amount of punishment.

The converse of the last proposition would, of course, be true, viz.: that if the defendant pointed a loaded gun at the deceased and "it went off," under circumstances in which it would have been lawful to have shot it off, the defendant would be regarded by the law as being guilty of no offence.

It is not necessary to notice especially the other errors assigned.

The judgment of the District Court is reversed, and the cause remanded for trial *de novo*.^k

Judgment reversed.

¹ See Vol. 2 Whart. Crim. Law, 5th Edition, § 1002 *et seq.*

^k On a subsequent trial, the defendant was convicted of manslaughter.

NOTE.—By statute in several States and Territories, excusable homicide by misadventure is thus defined :

“Excusable homicide by misadventure, is where a person in doing a *lawful act*, without any intention of killing, yet unfortunately kills another; as where a man is at work with an axe, and the head flies off and kills a bystander; or where an officer is properly punishing a criminal, and happens to be the occasion of his death, it is only a misadventure, for the act of correction was lawful.” Statutes of Arkansas, 1858, p. 333, § 32.

The same, substantially, is the California statute, which adds: “But if the parent or master exceed the bounds of moderation, or the officer the sentence under which he acts, either in the manner, the instrument, or quantity of punishment, and death ensue, it will be manslaughter or murder, according to the circumstances of the case.” Comp. Laws, Cal., 1853, p. 643, § 34.

The Colorado statute follows that of California. Revised Stat. Col., 1868, p. 200, § 33. So does the Illinois statute. Gross Ill. Statutes, p. 172, § 18.

The statute of Dakota simply declares, without any illustrations, that “Excusable homicide by misadventure, is when a person is doing a lawful act, without any intention of killing, yet unfortunately kills another.”

The New York statute is as follows: “Such homicide is excusable when committed—

“1. By accident and misfortune in lawfully correcting a child or servant; or, in doing any other lawful act with lawful means with usual and ordinary caution, and without any unlawful intent; or,

“2. By accident and misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, without any undue advantage being taken, and without any dangerous weapon being used and not done in a cruel and unusual manner.” Revised Statutes of New York, 5th ed., vol. 3, p. 939, § 4. The same is the Wisconsin Statute. Taylor Wis. Stat., vol. 2, p. 1827, § 6. So in Missouri. Wagner Mo. Stat., p. 446, § 5. So in Kansas. Gen. Stat. Kan., 1868, p. 320, § 10. The Minnesota statute declares: “Such homicide is excusable when committed by accident or misfortune, in lawfully correcting a child or servant, or in doing any other lawful act by lawful means, with ordinary caution, and without any unlawful intent.” Gen. Stat. Minn., 1867, p. 598, § 6.

It will be seen that these statutes are substantially drawn from the English text writers on criminal law. See, in addition to the authorities cited by the Court, 1 Hawk., P. C., Curwood's Ed., p. 87; 1 Hale P. C., 471 *et seq.* Statutes also exist in several of the above States and Territories, defining the degree of guilt, when the act which occasioned the homicide was unlawful or negligent.

As illustrating the doctrine that if death accidentally ensues while the slayer is engaged in his lawful defence, and using no more force than is necessary, the killing is excusable, the following case is frequently cited:

Upon an indictment for manslaughter, it appeared that the deceased and his servant insisted on placing corn in the prisoner's barn, which she refused to allow. They exerted force, and a scuffle ensued, in which the prisoner received a blow upon the breast; whereupon, she threw a stone at the deceased, and he fell down, and was taken up dead. HOLROYD, J.,

said: "This case fails on two accounts. It is not proved that the death was caused by the blow; and if it had been, it appears that the deceased received it in an attempt to invade her barn against her will. She had a right to defend her barn, and to employ such force as was reasonably necessary for that purpose, and she is not answerable for any unfortunate accident that may have happened in so doing." Under his Lordship's direction the prisoner was acquitted, and forthwith discharged. Hinchcliffe's case, 1 Lewin C. C., 161.

On the other hand, where a person is exerting no more than lawful force in the defence of his person, the killing of such person by his antagonist is murder. Baker's case, *ante*, p. 75. So, where he is exerting no more than lawful force to expel a trespasser from his habitation. Willoughby's case, 1 East P. C., 288; Hinton's case, *ante*, p. 83. The exertion of such force being lawful, and the necessity of exerting it being put upon the deceased by the wrongful conduct of the opposite party, it does not constitute a provocation such as will extenuate the killing to manslaughter. *Ibid*.

STATE v. BURKE.

[30 IOWA, 331.]

Supreme Court of Iowa, December Term, 1870.

CHESTER C. COLE, *Chief Justice*.
 JAMES G. DAY, }
 JOSEPH M. BECK, } *Judges*.
 WM. E. MILLER, }

KILLING TO PREVENT GREAT BODILY HARM.

A person may lawfully take the life of his assailant, when such killing is reasonably necessary to save himself from *imminent and great bodily harm*. The right of self-defence exists in such cases, the same as it does where the killing becomes necessary to save *life*. A person may excusably use the necessary force to save himself from any *felonious assault*. [Following *State v. Benham, ante*.]

Appeal from Black Hawk District Court.

The defendant was indicted for manslaughter at the September term, 1869, of the Black Hawk District Court. The cause was tried at the May term, 1870, a verdict of

guilty rendered, and the defendant sentenced to hard labor in the penitentiary for one year and six months; from which judgment he appeals.

Boies, Allen & Couch, for the appellant; *Henry O' Connor*, Attorney-General, for the State.

MILLER, J.—That the deceased, Henry Guyer, came to his death by reason of a blow inflicted by the defendant with a club or stick of wood, is not questioned.

The defence insisted upon in the District Court was, that the blow was struck by the defendant in reasonable self-defence, when attacked by the deceased and his brother, George Guyer. The evidence shows that the defendant, the deceased, and several other persons were at the house of one Conrad Paul, on Sunday evening, November 21, 1869; that the defendant and George Guyer quarrelled, and the deceased interfered, taking his brother's side in the quarrel. Paul protested against their quarrelling in the house, and requested them to desist or go out.

This seemed to quiet the parties for a time, when it was proposed by some one of the company that they would go home, and they all went out of the house apparently for that purpose. It was then quite dark. When all were out of the house and a short distance therefrom, the quarrel between the defendant, the deceased and George Guyer, was renewed, and a fight with clubs ensued, in which the defendant struck the blow that caused the death of Henry Guyer. The witnesses are not agreed as to who made the first attack. There was evidence tending to show that the Guyers made the first attack, and that the fight was forced by them on defendant. The medical witnesses testified that the skull of the deceased was much thinner than an ordinary human skull, and that a lighter blow would produce the injury found in the skull of deceased than on an ordinary skull.

On the trial, the defendant's counsel requested the following instructions: "If the jury believe that George

Guyer and the deceased made the first attack upon the defendant, armed with clubs, from which he had reason to, and did, believe that he was in imminent danger of *great bodily harm*, it was lawful for him to resist such attack with a weapon of like character to that used by his assailants, and if, in the use of such weapon, while exercising reasonable care to produce no greater injury than was necessary to protect himself from *great bodily injury*, he unintentionally gave a blow which would in ordinary cases, have been no more than was necessary to repel the assault made upon him, but which, by reason of the peculiar character of the skull of the deceased, or of the particular place where the blow happened to fall, did produce death, the defendant would not be guilty of the crime charged.

“If the jury believe that George Guyer and deceased, acting in concert and with the intention of inflicting great bodily injury upon defendant, made an attack upon him, armed with clubs, and struck him the first blow, and that they were in such close proximity to him at the time of such attack, that he could not retreat without danger of great bodily harm, then he had the right to resist such attack with a weapon of the same character as those used by his assailants, and if, in using such weapon, while exercising reasonable care to apply no more force than was necessary to repel the attack upon him, he accidentally and unintentionally gave a blow to his assailant which produced death, such act would not be criminal, and the jury should not for that reason convict.

“If the jury believe that George Guyer and deceased, acting in concert, and with the intention of inflicting great bodily harm upon defendant, attacked him with clubs, the defendant had the right to resist such attack with a weapon of like character, and if, in the necessary defence of his own person, and without using any more force, or a more dangerous weapon than was being used against him, he inflicted a blow which he had reason to, and did believe, was necessary for his own protection,

but which, unintentionally upon his part, produced death, such act would not be criminal, and the jury should acquit."

The Court refused each of these instructions, and gave the following, touching the right of self-defence:

"If the jury believe from the evidence that the defendant, without solicitation and against his will, was attacked by the deceased with a deadly weapon, and the attack was such as to create a fear of death in the mind of a person of ordinary courage and prudence, and did create such an apprehension in the mind of the defendant, then he would be justified in using a similar weapon with prudence and caution in defending himself, and if you find from the evidence, that in the exercise of such prudence and caution, and in reasonable fear of imminent danger to his own life, the defendant took the life of the deceased, you must find the defendant not guilty."

To the giving of this instruction, and in refusing those asked by the defendant, proper exceptions were taken.

There was error in the rulings of the Court.

By refusing the instruction asked by the defendant and giving the above, the Court denied the defendant the benefit of the plea of self-defence if he took his assailant's life to save himself from imminent danger of great bodily injury. The law gives a person the same right to use such force as may be reasonably necessary, under the circumstances by which he is surrounded, to protect himself from *great bodily harm*, as it does to prevent his life being taken. He may excusably use this necessary force to save himself from any felonious assault. It was expressly so held by this Court, in the case of *The State v. Benham*,^a 23 Iowa, 154, 162. The same view is supported in the following cases: *The State v. Thompson*,^b 9 Iowa, 188; *The State v. Decklots*,^c 19 Iowa, 447; *The State v. Neeley*,^d 20 Iowa, 108; *The State v. Kennedy*,^e 20 Iowa, 569.

^a *Ante*, last case. ^b *Ante*, p. 92. ^c *Ante*, p. 113, note. ^d *Ante*, p. 97.
^e *Ante*, p. 106.

The judgment of the District Court is reversed, and a new trial ordered.

Judgment reversed.

REGINA V. SMITH.

[8 CAR. & PAY., 160.]

Central Criminal Court, October Session, 1837.

Present { MR. JUSTICE BOSANQUET,
MR. BARON BOLLAND,
MR. JUSTICE COLTMAN.

KILLING WITH DEADLY WEAPON—DEGREES OF HOMICIDE.

1. If a person, being in possession of a deadly weapon, enter into a contest with another, intending at the time to avail himself of it, and in the course of the contest actually use it and kill the other, it will be *murder*; but if he did not intend to use it when he began the contest, but used it in the heat of passion, in consequence of an attack made upon him, it will be *manslaughter*. If he use it to protect his own life, or to protect himself from such serious bodily harm, as would give him an immediate apprehension that his life was in danger, having no other means of defence, and no means of escape, and retreating as far as he can, it will be *justifiable homicide*. [See John Kennedy's case, *ante*, where this case is cited.]

The prisoner was charged, on the coroner's inquisition, with the wilful murder of James Chaplin; he was also indicted for killing and slaying him.

The prisoner was a private of the Cold Stream Guards, and was discharged on the 11th of October; and on the evening of that day went to the Three Horse Shoes, at Hampstead, in company with a person named Burkhill, and his brother, Richard Smith. There were two more soldiers in the public house. A dispute arose about paying the reckoning, and a fight took place between the prisoner and a man named Burrows. In the scuffle Burrows fell down by the fire-place on his knees, and the deceased jumped over the table and struck the pris-

oner. The deceased was turned out by the landlord, but was admitted again in about ten minutes, and the parties all remained drinking together after that for a quarter of an hour, when the prisoner and his brother went out. The deceased remained about a quarter of an hour after the prisoner, and then left. The prisoner and the deceased were both in liquor. The deceased tried to get out directly after the prisoner and his brother left, but was detained by the persons in the room. As soon as they let him go, he jumped over the table and went out of the house, saying, as he went, that if he caught them he would serve them out. The deceased was a person who boasted of his powers as a fighter. He followed the prisoner and his brother into a mews not far from the place where they had been drinking, and a witness who lived near, stated that he heard a noise and went to the door of his house, and then heard a bayonet fall on the ground, and on going out into Church-lane, heard a person named Croft crying out, "Police! Police! a man is stabbed;" and on going up, found the deceased lying on the ground wounded. Croft stated that he was in Field-place, near Church-lane, and heard voices, which induced him to run toward a bar there, and when within a yard of the bar, he heard a blow like the blow of a fist. This was followed by other blows; and after the blows, he heard a voice say, "Take that;" and in half a minute, to the best of his judgment, the same voice said, "He has stabbed me." The wounded man then ran toward him, and he discovered it to be the deceased. He said, "I am stabbed," three times, and soon after fell on the ground. The prisoner was soon afterward taken into custody, and was then bleeding at the nose. Several other witnesses were examined; the prisoner had no side-arms, but his brother, who was with him, had a bayonet.

For the defence, the prisoner's brother was called as a witness, and stated that when they had got about twenty yards through the bar mentioned in Croft's evidence, he heard somebody say something, but did not take notice

of it, and deceased came up and struck him on the back of the head, which caused him to fall down, and his bayonet fell out of the sheath upon the stones, and the deceased picked it up, and followed the prisoner, who had gone on. There was a great struggle between them, and very shortly after, the deceased cried out, "I am stabbed! I am stabbed!"

Several other witnesses were called, who proved that there were wounds on the prisoner's hands, such as would be made by the stabs of a bayonet, and that his back was one uniform bruise. It was suggested, during the examination of another surgeon, who examined the body of the deceased after death, that the deceased might have fallen upon the bayonet, and so received the wound; but he said he could not imagine any position in which the deceased could fall, to have caused the instrument to take the direction which it did.

BOSANQUET, J., in summing up, (BOLLAND, B., and COLTMAN, J., being present,) said: The prisoner stands charged upon the coroner's inquisition with the crime of murder, and is also indicted for the lesser offence of manslaughter. The question for you, on a careful consideration of the whole of the evidence, will be, whether he was guilty of either the one or the other, or whether the circumstances of the case were such as to entitle him to an acquittal; whether he is guilty of murder or of manslaughter, or whether his act was justifiable or excusable. Upon the question of whether it amounts to murder, you will have to consider this: Did the prisoner enter into a contest with an unarmed man, intending to avail himself of a deadly weapon? for if he did, it will amount to murder. But, if he did not enter into the contest with the intention of using it, then the question will be, did he use it in the heat of passion, in consequence of an attack made upon him? If he did, then it will be manslaughter. But there is another question: Did he use the weapon in defence of his life? Before a person can avail himself of that defence, he must satisfy the jury that the defence was necessary; that he

did all he could to avoid it, and that it was necessary to protect his own life, or to protect him from such serious bodily harm, as would give a reasonable apprehension that his life was in immediate danger. If he used the weapon, having no other means of resistance and no means of escape, in such case, if he retreated as far as he could, he will be justified. There is a further question which is raised by the defence, that the death was the result of accident by the deceased, in the scuffle, falling upon the bayonet. This ranges itself under the first question; because, if the fact were so, the death cannot be said to have been occasioned by the act of the prisoner.

His Lordship went through the evidence, and left the case to the jury, who found the prisoner *guilty of manslaughter*, and strongly recommended him to mercy on account of the great provocation he had received. *Sentence. six months imprisonment.*

THE STATE v. SHIPPEY.

[10 MINNESOTA, 223.]

Supreme Court of Minnesota, January Term, 1865.

THOMAS WILSON, *Chief Justice.*
 S. J. R. McMILLAN, }
 JOHN M. BERRY, } *Judges.*

SELF-DEFENCE—NECESSITY—PREVENTION—RIGHT OF ATTACK—BELIEF OF DEFENDANT—INSTRUCTIONS ON SELF-DEFENCE.

1. Self-defence is, *ex vi termini*, a defensive, not an offensive act, and must not exceed the bounds of mere defence and prevention. To justify such act, there must be at least an apparent *necessity* to ward off by force some bodily harm.

2. The mere fact that the defendant *believed* it necessary for him to act in self-defence, would not warrant a verdict of acquittal, [See Grainger's case, *post*, and note.]

3. The right to defend one's self does not arise, until the defendant has, at least, attempted to avoid the necessity of such defence. Where a defendant has not retreated from, or attempted to shun the combat, but unnecessarily entered into it, his act in killing his adversary is not one of defence. [Acc. Sullivan's case, *ante*, p. 65. *Contra*, under certain circumstances. Bohannon's case, *post*.]

4. Where the evidence shows conclusively that the homicide was not committed in self-defence, real or imaginary, an instruction on the law of self-defence, though erroneous, is no ground of reversing the judgment. [Acc. Harrison's case, *ante*, p. 71; Shorter's case, *post*; Wells' case, *post*; MORGAN, J., in Lamb's case, *post*; Evans' case, *post*. But see Logue's case, *post*, and Pridgen's case, *post*.]

This was an application to the Supreme Court, on the part of the defendant, for a new trial, under § 6, p. 777, of the Comp. Stat. of Minnesota, ed. of 1859.

The defendant was tried upon an indictment for the murder of Frederick Raymond, at the October Term of the Wright County District Court, 1864, and convicted of murder in the first degree. At the trial, Edward Morse, a witness for the prosecution, testified substantially as follows:

"I reside at Minneapolis; have seen prisoner; saw him on the 8th day of March, 1864, for the first time, in the township of Rockford; Fred. Raymond, David Kridler, and David Beadle were with me; Raymond was the man killed. We were going from the village of Rockford to Woodland; the road led about six rods from Shippey's house, and when some quarter of a mile from Shippey's house, Raymond said he was dry, and would like some water, and as we got opposite the house, I said, let us go in and get some, and we went into Shippey's enclosure. Shippey was outside of his house; it was about three o'clock in the afternoon; I asked him for a drink of water; he said nothing, but turned and went as though he was going to get some, going around his house a few steps and stopping. Raymond then asked for water. He then ordered us to leave, and said we had no business there. Raymond then said, that is a strange way to use folks; Shippey then ordered us to leave again; I spoke to Raymond, and said, 'Let us leave, and have no trouble with the old

man;' we had no arms or other implements of defence; Raymond said, 'Of course,' and then walked off, and I followed him towards the road; did not see anything until I was going through the fence. Kridler spoke, saying, 'Look out, Fred., he has a gun.' I looked around, and saw him with a gun in his hand; saw, then, a stick going through the air from the direction in which Raymond was towards Shippey; Raymond had passed out before me; this stick was about eighteen inches long and three-fourths of an inch thick, and looked like a root; do not think the club was thrown with the intention of hitting him; it was not thrown with much violence; do not think it went to Shippey; do not think Shippey had advanced towards us until the stick was thrown. When I first saw Shippey, he was lowering his gun from the direction of Kridler; when Fred. threw the stick, he pointed the gun at Fred.; Raymond then jumped behind a tree; Shippey did not speak that I heard; Shippey then stepped sideways, as if he would like to get a shot at Raymond; Raymond then stepped from behind the tree, and told him if he wanted to shoot, to shoot; prisoner then took a long aim at Raymond, and fired; they were about twenty feet apart; Raymond then stepped two or three feet sideways, and laid down. About an hour afterwards, I went up to the body, and found it in the same position; the body was taken down to the warehouse in Rockford."

Other evidence was introduced, corroborating the testimony of Morse, and also proving the death of Raymond, and that it was occasioned by the discharge of Shippey's gun, testified to by Morse.

* * * * *

Wilson & McNair for the prisoner; *G. E. Cole*, Attorney-General, for the State.

WILSON, Ch. J.

* * * * *

The facts of this case incontrovertibly show that the prisoner did not act, and could not have supposed it

necessary to act in self-defence. He was the pursuer, not the pursued. Self-defence can only be resorted to in a case of necessity.

The right to defend himself would not arise until defendant had, at least, attempted to avoid the necessity of such, self-defence. *People v. Sullivan*,^a 3 Seld., 399; *Whart. Cr. Law*, 386;^b *Regina v. George Smith*,^c 8 Car. & Payne, 160.

The defendant's counsel asked the Court to charge the jury, "that if the jury believe that the prisoner, at the time of the killing, believed in the existence of a state of facts, which if true, would have constituted self-defence, they must find a verdict of acquittal," which the Court refused; but charged the jury that "the facts must be such as reasonably to have raised such belief or apprehension on the part of the defendant."

The Court was correct in refusing to charge as thus requested. The mere fact that the defendant *believed* it necessary for him to act in self-defence, would not warrant a "*verdict of acquittal*."

It is not enough that the party believed himself in danger, unless the facts and circumstances were such that the jury can say he had reasonable grounds for his belief. *Comp. Stat.*, 703, § 5^d; *Shorter v. The People*,^e 2 Comst., 193; *Wharton's Cr. Law*, 386; *Arch. Cr. Prac. and Pl.*, 798; *U. S. v. Zigol*^f, 2 Dallas R., 346.

In Tennessee, I believe, it has been held otherwise; *Grainger v. The State*,^h 5 Yerger, 459; but I think this decision stands alone, unsupported by either principle or authority. Such belief would, perhaps, reduce the crime to manslaughter, but whether it would or not, it is not necessary to decide in this case.

The only exception taken to the charge of the Court is above given, and we must therefore presume, that in

^a *Ante*, p. 65. ^b 5th ed., vol. 2, § 1019 *et seq.* ^c *Ante*, last case.
^d Ed. of 1859. ^e *Post*. ^f See 5th ed., vol. 2, § 1026.

^g This citation is inadvertent. The case does not relate to the subject under consideration. See note to *Neeley's case*, *ante*, p. 104, where it is examined.

^h *Post*.

every other respect it was full and correct. But even if the charge in this respect had been erroneous, it would not be a good ground for reversal of judgment.

Self-defence, *ex vi termini*, is a defensive, not an offensive act, and must not exceed the bounds of mere defence and prevention.

To justify such act, there must be, at least, an apparent *necessity* to ward off by force some bodily harm.

Where the party has not retreated from, or attempted to shun the combat, but has, as in this case, unnecessarily entered into it, his act is not one of self-defence.

The plaintiff by taking his gun and following after the deceased, without any previous provocation, (such as the law will recognize as provocation for the use of a deadly weapon,) showed conclusively that the homicide was not committed in self-defence, real or imaginary. The evidence, therefore, did not make a case for laying down the law of self-defence, and an error of the Court concerning an abstract proposition, having nothing to do with the matter in hand, is not sufficient ground for reversing a judgment. *Shorter v. The People*,¹ 2 Comst., 202.

* * * * *

New trial denied.

THE STATE v. JAMES D. KENNEDY.

[7 NEVADA, 374.]

Supreme Court of Nevada, January, 1872.

J. F. LEWIS, *Chief Justice.*

B. C. WHITMAN, } *Associate Justices.*
JOHN GARBER, }

CHARGING UPON MATTERS OF FACT—RETREATING TO THE WALL.

1. A charge that "In order to make a killing under such circumstances as have been proven, justifiable homicide, it must appear that the party

¹ *Post.*

killing had retreated as far as he safely could at the time, and in good faith declined all further contest, and was compelled to kill his adversary in order to save himself from death or great bodily harm, which to a reasonable man would appear imminent," was substantially saying to the jury that the defendant was guilty either of murder or manslaughter, provided they were satisfied he did not retreat to the wall before he killed deceased, thus assuming the proof of all the other material and essential facts; and was hence error.

2. Where it appeared that the deceased had beaten the defendant in a brutal manner, and when compelled by third persons to desist, had, in the hearing of the defendant, asked for a pistol, and said he would shoot him on sight; and that when they next met, the deceased, without being assailed, rushed at the defendant with hostile demonstrations: *Held*, that if the demonstrations were such as to justify the belief that the deceased intended to carry out his threat, the defendant would be justified in killing him without retreating.

Indictment for the murder of John Keeland. Conviction of murder in the second degree. Sentence, fifteen years imprisonment. Motion for new trial overruled. Appeal.

Ellis & King, for appellant; *L. A. Buckner*, Attorney-General, for the State.

LEWIS, Ch. J., delivered the opinion of the Court.

The jury in this case were instructed that "in order to make a killing, *under such circumstances as have been proven*, justifiable homicide, it must appear that the party killing had retreated as far as he safely could at the time, and in good faith declined all further contest; and was compelled to kill his adversary in order to save himself from death, or great bodily harm, which to a reasonable man would appear imminent." This instruction clearly assumes the proof of material facts, leaving but one question to be determined by the jury, namely: whether the defendant had retreated as far as he safely could before he killed the deceased. The "circumstances proven," as it is stated by the Court, render him clearly guilty of a crime, provided the jury did not find the one fact—that he retreated as far as he safely could—in his favor. This was substantially saying to the jury that the defendant was guilty, either of murder or manslaughter, provided they were satisfied he did not retreat

to the wall before he killed the deceased, thus assuming the proof of all the other material and essential facts.

The evidence shows that a short time before the killing, the deceased had beaten the defendant in a brutal manner, and when compelled to desist by the interference of third parties, asked, in the hearing of the defendant, for a pistol, and said that he would shoot him, the defendant, "on sight." There is also some slight evidence that ten or fifteen minutes afterward, when the parties met, the deceased rushed at the defendant in a hostile manner, when the scuffle, which resulted in the death of the deceased, occurred. If it be true that the threat was made by the deceased to kill defendant the first time he saw him, and when they next met he rushed at him with hostile demonstrations, the defendant, if not the assailant, would not be compelled to retreat; but if the demonstrations were such as to justify the belief that the deceased intended to carry out his threat, the defendant would be justified in killing him without retreating. *Rosc. Crim. Ev.*, 765. But this instruction ignores all these circumstances of the case, and assumes that there was no ground of justification to the defendant, except that of having retreated as far as he safely could.

Judgment reversed.

NOTE.—Where a *known felony* is attempted upon person or property, the assailed is not obliged to retreat, but may pursue his adversary until he finds himself out of all danger. 1 *East P. C.*, 271; *Foster*, 273; *Kelyng*, 128, 129. The expression, "known felony," is here understood to mean open and forcible felonies as contradistinguished from secret felonies, such as the picking of pockets. *Roscoe Crim. Ev.*, 638; *Pond's case*, *post*; 1 *East P. C.*, 273. Mr. Sergeant Hawkins, after showing that there can be no distinction in point of sense between defence against one who assails me to murder me, and defence against one who assails me to rob me, and that the former ought to be held *justifiable* as well as the latter, and not merely *excusable*, nevertheless says: "However, perhaps in all these cases, there ought to be a distinction between an assault *in a highway* and an assault *in a town*. For, in the first case, it is said that the person assaulted may justify killing the other without giving back at all; but that in the second case, he ought to retreat as far as he can without apparently hazarding his life, in respect of the probability of getting assistance." 1 *Hawk. P. C.*, Ch. 10, § 25. We do not recollect any case where this distinction has been taken.

Some of the American cases lay down the necessity of retreating before killing, without qualification, as though it were incumbent in all cases where a man can retreat with safety, without noticing the distinction taken by the old writers between felonious and non-felonious attacks. See, for instance, PARKER, J., in Selfridge's case, *ante*, pp. 16, 17; John Doe's case, *ante*; Drum's case, *post*; Robertson's case, *post*; Benham's case, *ante*. So, the English case of Regina v. Bull, *post*. At the same time, it is stated in three cases in Iowa that a person who is assailed with a deadly weapon, is not bound to retreat before killing. Thompson's case, *ante*; John Kennedy's case, *ante*; Tweedy's case, *post*. But the reason given by these cases is that stated by Sir William Russell, that the assault may be so fierce as not to allow him to yield a step, without manifest danger of his life, or great bodily harm. *Ibid.*; 1 Russ. Cr., 661.

It has been held in several cases in Kentucky that a man is not obliged to avoid an adversary who has threatened his life, and who persistently seeks to kill him. Bohannon's case, *post*; Phillips' case, *post*; Young's case, *post*; Carico's case, *post*. And the same principle, though not expressly decided, may well be inferred from Monroe's case, *post*. In Copeland's case, *ante*, which is manifestly as proper a case as any of those above cited, for applying the requirement of "retreating to the wall," the Supreme Court of Tennessee concluded that the killing was probably self-defence, without alluding to the subject of retreating at all. In Texas, an instruction which entirely denied the requirement of retreating before killing, in case of personal conflict, was approved by the Supreme Court. See Isaac's case, *post*. In Pond's case, *post*—an able and instructive case—the distinction taken by the common law writers between justifiable homicide committed in resisting the commission of felonies, and excusable homicide in defending one's person against non-felonious assaults, or in mutual combat, where the law assumes that the slayer himself is in some fault, is clearly kept in view; and, following the old writers, the Court say: "If any forcible attempt is made with felonious intent against person or property, the person resisting is not obliged to retreat, but may pursue his adversary, if necessary, until he finds himself out of all danger." In Patton's case, *post*, the principles of Pond's case are recognized as an accurate exposition of the law of homicide in self-defence. In many cases, the rule above stated in Pond's case is recognized in the language in which it is laid down by Foster and East. See, for instance, Carroll's case, *post*; PARSONS, Ch. J., in Selfridge's case, *ante*, p. 1; Riley's case, *post*, and Collins' case, *post*.

In some of the cases, the rule is stated in the language of Foster and East, leaving out that part which relates to the liberty of standing one's ground, and of pursuing the assailant. Thus, Wiltberger's case, *ante*, p. 38: "A man may oppose force to force in the defence of his person, his family, or property, against one who manifestly endeavors, by surprise or violence, to commit a felony, as murder, robbery or the like." So, Thompson's case, *ante*; John Kennedy's case, *ante*, and Field's case, *post*.

In Pierson's case, 12 Ala., 149, the question arose in a capital case, upon a request by the prisoner, and a refusal by the Circuit Judge, to instruct the jury as follows:

1. That the prisoner, after he had been slapped three times in the face by Rich, was not bound to retreat before he killed him.

2. That no man in this country is bound, according to the English common law, to retreat before he kills.

Upon this point, GOLDTHWAITE, J., delivering the opinion of the Court, said: "The common law of this State on the subject of homicide, is derived from, and the same as, the common law of England; and whenever that law requires the person assailed to decline the combat, or to retreat, before he will be excused in taking the life of his adversary, our law requires the same. There is nothing in our institutions which has abrogated the rule that no one is excused from shedding his brother's blood, unless the assault upon him is such as to produce a well-grounded apprehension of imminent danger to life or limb." But the Court does not explain what that common law of England is on this subject.

In Creek's case, *post*, the Supreme Court of Indiana, in criticising an instruction in a case of homicide, say: "Retreat may be impossible or perilous, and is not, therefore, always a condition which must precede the right of self-defence. The law upon the subject is so accurately laid down in the text books, that it seems to us unnecessary to discuss it further." This case leaves us equally in the dark with the Alabama case, *supra*, as to what the law on the subject is, but refers us to the text books, which we think, with deference, leave the subject in considerable uncertainty, if not confusion.

In a case at nisi prius in New York, EMOTT, J., in charging the jury, said: "To justify the prisoner in killing Aaron Cole in self-defence, it is necessary that the prisoner himself should have been attacked; that he should have reasonable ground to suppose that the object of the attack was to kill him, or to do him great bodily harm; that he should have been unable to withdraw himself from this imminent danger, and, therefore, should have been compelled to kill Aaron Cole to protect himself from the attack." *People v. Cole*, 4 Park., C. C., 37.

In *Commonwealth v. Carey*, 2 Brewster, 401, the defendant's counsel made the following point: "If the jury believe from the evidence that the deceased attacked the prisoner with violence, and that the defendant believed the deceased intended to take his life, or inflict great bodily harm upon him, the prisoner was justified in not retreating, but had a right to pursue the deceased until he had secured himself from all danger, and if he killed the deceased in so doing, it was justifiable self-defence."

BREWSTER, J., (apparently misunderstanding the point made,) is reported to have said: "We answer that a man is not bound to stand and permit himself to be murdered or seriously injured; he may defend himself. But the attack must have been such as in the belief of the prisoner, rendered it necessary for him to defend himself, even to the taking of the life of the deceased. It would then be *excusable* homicide."

This language is inaccurate in making the *belief* of the prisoner the test of his justification. See note to Grainger's case, *post*.

In the note to Selfridge's case, *ante*, p. 28, *et seq.*, we have discussed the subject of "retreating to the wall" at some length, and have endeavored to show what seems to be the better opinion on the subject, in view of the authorities, old and new. In this note, we have endeavored to show,

briefly, the force of the American cases so far as they discuss this question. And it is seen that there is a numerous class of cases which, in discussing this subject, either lose sight of the distinction between the resistance of non-felonious attempts, and those where a forcible felony is manifestly intended; or else, which make, in all cases of defence of the person—whether it be against a felonious assault, or an assault non-felonious, or in mutual combat—retreat, in all cases where retreat is possible, a pre-requisite to the right to kill.

Nor can these cases be clearly said to involve a departure from the law as it formerly stood. For there seems to have existed among the old writers some difference of opinion on the subject; or if not some difference of opinion, at least the same mixing up of the doctrine of mutual combat and felonious assault that occurs in some of the cases and text books of the present day. Thus Lord Hale says: "Regularly, it is necessary that the person that kills another in his own defence fly as far as he may to avoid the violence of the assault, before he turn upon his assailant; for, though in cases of hostility between two nations, it is a reproach and piece of cowardice to fly from an enemy, yet in cases of assaults and affrays between subjects under the same law, the law owns not any such point of honor; because the king and his laws are to be the *vindices injuriarum*, and private persons are not trusted to take private revenge one of another." 1 Hale P. C., 481. But to this rule he makes exceptions in case of an officer assaulted by his prisoner; in case of an assault by a *thief to rob or murder*, and in case where retreat is impossible.

On the other hand, the statement of doctrine with which we set out in this note, is thus given in the judgment of the court of King's Bench, in Mawgridge's case, Kelyng, 128-9: "It is not reasonable for any man that is dangerously assaulted, and when he perceives his life is in danger from his adversary, but to have liberty for the security of his own life, to *pursue* him that maliciously assaulted him; for he that hath manifested that he hath malice against another, is not fit to be trusted with a dangerous weapon in his hand. Dalt., 292; Hale, 42 And so resolved by all the judges, 18 Car., 2, when they met at Sergeant's Inn in preparation for my Lord Morley's trial, Dalton, 272."

With reference to this last citation, we may remark, however, that we have not seen Dalton's Justice; but the resolutions of the judges in Lord Morley's case, as reported in Kelyng, 53—and Kelyng himself sat in that trial as Chief Justice—do not touch upon the question of the right to pursue after felonious assaults. See, also, Howell's State Trials, vol. 6, p. 770, where the resolutions are given as in Kelyng's Reports. The resolution referred to is probably the one we have set out in the note to Stoffer's case, *post*.

It may not be amiss to go still farther back, and call in the testimony of one whose name will never be mentioned without honor as long as the common law shall exist. Lord Coke, in his third Institute, p. 55, speaking of non-felonious homicide, says: "Some without any giving back to a wall, etc., or other inevitable cause. As if a thief offer to rob or murder B. either abroad or in his house, and thereupon assault him, and B. defend himself without any giving back, and in his defence killeth the thief, this is no felony; for a man shall never give way to a thief, etc., neither shall he forfeit anything."

Mr. East has exerted himself to preserve the distinction between defence against felonious and non-felonious attempts, and has made several observations from an original point of view, which are worthy of attention. 1 East, P. C., 271 *et seq.* We think the outlines of the question become still clearer under the pen of Mr. Bishop; but it will deserve further attention at the hands of courts before it can be extricated from the confusion in which some of the courts and text writers have left it. See Stewart's case, *post*, where a divided court refused to consider the subject.

In Texas, the question has been apparently put at rest, either for better or worse, by a statute which does away, in all cases, with the requirement of retreating before killing; and which has otherwise attempted to establish a set of fixed rules which shall cover all cases of homicide in defence of person or property. See the statute set out in the note to Isaac's case, *post*.

Out of the right to pursue one who has made a felonious attempt upon person or property, springs this very nice and interesting question: If the assailed may rightfully pursue, may the assailant, after having retreated as far as he can, turn and resist? And if he do so, and in resisting kill the assailed, is he guilty of any crime? This question is considered in Stoffer's case, *post*, and note to the same.

FORSTER'S CASE.

[1 LEWIN C. C., 187.]

Lancaster Spring Assizes, 1825.

KILLING PRISONER BY OFFICER IN SELF-DEFENCE, OR IN AFFRAY.

1. An officer must not kill for an escape, where the prisoner is in custody for a misdemeanor.

2. If the officer has reasonable ground for believing that he is in danger of death or bodily harm, he may have recourse to a deadly weapon, if no other is at hand. So, if he has been rendered incapable by previous violence of using a weapon less dangerous in its character.

3. But if there be an affray, and mutual blows in heat, and the officer kill, it will be manslaughter, although the other party was originally doing something unlawful.

The prisoner was charged on the coroner's inquisition with murder. The prisoner was an excise officer, and, being in the execution of his office, had seized, with the assistance of another person, two smugglers, whom he detected in the act of landing whiskey from the Scottish shore contrary to law.

It appeared that the deceased had surrendered himself quietly into the hands of the prisoner, but shortly afterwards, when the prisoner was off his guard, he assaulted him violently with an ash stick, which cut his head severely in several places; that he lost much blood from the wounds, and was greatly weakened in the struggle which succeeded; that, fearing the smuggler would overpower him, and having no other means of defending himself, he discharged a pistol at the deceased's legs, in the hope of deterring him from any further attack; that the discharge did not take effect, and the smuggler prepared to make another assault; that seeing this, the prisoner warned him to keep off, telling him he must shoot him if he did not; that the smuggler disregarded the warning, and rushed towards him to make a fresh attack; that he thereupon fired a second pistol and killed him.

HOLROYD, J., to the jury: "An officer must not kill for an *escape*, where the party is in custody for a misdemeanor; but if the prisoner had reasonable ground for believing himself to be in peril of his own life, or of bodily harm, and no other weapon was at hand to make use of, or if he was rendered incapable of making use of any such weapon by the prisoner's violence that he had received, then he was justified. If an affray arises, and blows are received, and weapons are used in heat, and death ensues, although the party may have been, at the commencement, in the prosecution of something unlawful, still it would be manslaughter in the killer, though manslaughter only. In the present case it is admitted that the custody was lawful. The jury are then to say whether, under all the circumstances, the deceased being in the prosecution of an illegal act, and having made the first assault, the prisoner had such reasonable occasion to resort to a deadly weapon to defend himself, as any reasonable man might fairly and naturally be expected to resort to.

Verdict, manslaughter; sentence, one month's imprisonment.

NOTE.—It is perhaps noteworthy that this case accords with the American decisions in this: It places the defendant's justification upon the reasonableness of his fear, which *Regina v. Bull, post*, does not, and which *Regina v. Smith, ante*, does but partially. Consult upon this point the cases in SUBDIVISION D of this PART, *post*. If the facts are correctly stated, few American courts would have permitted a verdict of manslaughter in this case to stand.

B.—DEFENCE AGAINST DEATH OR GREAT BODILY HARM, WHERE THE EXIGENCY ARISES IN MUTUAL COMBAT.

THE STATE v. WELLS.

[1 COXE, 424.]

Supreme Court of New Jersey, September Term, 1790.

(The names of the Judges are not given in the original report.)

MUTUAL COMBAT—RELATIVE STRENGTH OF THE PARTIES—RETREATING TO THE WALL—MANSLAUGHTER—NO NEW TRIAL WHERE THE MERITS HAVE BEEN ATTAINED.

1. Where the prisoner stated after the homicide that he could easily handle the deceased, and that the deceased was no more than a child in his hands; and it was proved that the prisoner and deceased being engaged in mutual combat without weapons, the prisoner seized a heavy club, and dealt the deceased a blow which crushed in his skull, causing death, this was held to be clearly manslaughter, and not excusable self-defence.

2. If A. and B. are engaged in combat without weapons, and A. presses B. to the wall, so that further retreat is impossible, and B. thereupon seizes a dangerous weapon, and with it kills A., this is manslaughter, and not excusable homicide.

3. The rule stated that no man is justified or excusable in taking away the life of another, unless the necessity for so doing is apparent, as the only means of avoiding his own destruction or some very great injury.

4. In criminal cases, where there has been a conviction, if justice has been done, and if the result of another trial ought to be the same as the

first, and if the revising Court are decidedly of this opinion, a new trial will not be granted, although the Judge may have directed the jury improperly, or may have rejected evidence which, strictly speaking, ought to have been admitted. [See note, *sub. fin.*]

This was a motion for a new trial. The defendant had been indicted at the Oyer and Terminer for Morris County, for manslaughter; pleaded not guilty, but was convicted. The defence was, that the homicide was excusable. The judgment was respited upon application of the defendant's counsel, in order to take the opinion of the whole Court upon a case stated, containing all the circumstances that had occurred, and the following case was made:

It appeared that there had been some misunderstanding between the deceased and the prisoner respecting a turkey, which was at the place where the deceased lived. On the 22d of November, 1789, the prisoner came to the house of the deceased for the turkey which he demanded; the deceased being then absent from home at the house of one Jansen, a blacksmith. The wife of the deceased desired the prisoner would call again when her husband should be at home, which he declined doing. She then told him that her husband had left word that if the prisoner took any fowl, he should take one particular one, which the prisoner after looking at it, said he would not have, but would go and see the deceased upon the subject; upon which she told him to take which he pleased. The prisoner then went out, caught a turkey, brought it into the house, and said that he had some business at the blacksmith's, where he should see the deceased, and settle with him for the fowl. The wife then requested he would not go there, expressed her apprehensions lest he might get into a quarrel with her husband, and wished him to go home with the turkey, which he promised he would do.

The prisoner took the turkey and carried it to his own house, which was about a mile and a half distant from the deceased. After remaining at home some time, during which he was assisting his brother in some work, he

took a shovel which required mending, at the desire of his brother, to the blacksmith's shop, which was about half way between where the prisoner lived and the house of the deceased. He found the deceased at the shop, standing near the door. After some words had passed upon the subject of the prisoner's taking the turkey, the deceased appeared angry and gave the prisoner some harsh language, calling him a thief. The prisoner went into the shop, the deceased following immediately after him, jostling the prisoner with his elbow and using extremely abusive language, the prisoner at the same time making no resistance. When they had got into the shop, and after some further words had passed relative to their taking the law of each other, the deceased said, if it was not for the law he would whip the prisoner, and the latter replied, he need not be afraid of that, and he was ready for him. Thereupon the deceased made up to the prisoner, struck him and seized him by the hair, when the prisoner caught him by the thigh or round the body, and ran him up into the corner of the shop, when the blacksmith interfered, parted them, gave to each his hat, and expostulated with them.

After they were separated, the deceased and the prisoner were standing several feet apart, when the quarrel was renewed, the deceased first using aggravating language, to which the prisoner replied in a similar strain, when the former stepped up and struck the latter, who returned the blow and struck the deceased in the face.

The prisoner, upon receiving the blows from the deceased fell against the vice, when he took up a club and struck the latter a blow which knocked him down and occasioned his death.

It also appeared from the testimony both of the blacksmith and his son, that when the prisoner gave the fatal blow, he could not, in their opinion, have retreated further; that near the place where he took up the club with which he struck the deceased, there were also the handle of a dung-fork, some blacksmith's hammers, and

some old scythes, any of which the prisoner might have taken in hand as easily as the club with which he gave the mortal stroke.

It appeared that the fracture in the skull of the deceased was upward of five inches in length, and about an inch and a half in breadth, and the bones were much broken. Two of the witnesses also swore that the prisoner in conversation with them afterwards, on the day the fray occurred, declared to them he could manage the deceased almost as he pleased. To another of the witnesses he said, that the deceased was no more in his hands than a child; and to another, that when the deceased struck him in the second affray, he looked toward the door in order to go out, but as he could handle the deceased as he pleased, he thought it would appear cowardly, and he would not do it.

The defence set up by the prisoner was that of excusable homicide. After citing several authorities to show what was the legal signification of this phrase, they examined one or two other witnesses to show that the prisoner was on friendly terms with the deceased, and to rebut an idea, which had been rather intimated than proved, that there was a previously subsisting quarrel between them.

The Judge, in his charge to the jury, having observed that as the act of homicide was fully proved, and indeed admitted on behalf of the prisoner, told them that the subject of their inquiry was, whether the prisoner at the bar was guilty as he stood charged in the indictment or not; that homicide was in some cases justifiable, and in others was excusable; but, he remarked, that whoever would shelter himself under the plea of self-defence, more particularly in the case of a mutual combat, must make it appear that, before the mortal stroke was given, he had declined any further combat; that he had retreated as far as it was possible to do with safety, and that he killed his adversary through mere necessity, in order to avoid his own destruction.

He informed them further, that it was the peculiar province of the jury, after hearing the evidence given, to determine in their own minds, whether upon the evidence so given, the prisoner, before striking the mortal blow, had retreated as far as could with safety ; and whether he had killed his adversary through mere necessity, and for the preservation of his own life. If they should be satisfied that he had not failed in either of these circumstances, they would acquit the prisoner ; if otherwise, it was their obvious duty to find him guilty as charged in the indictment.

The jury, after being out some time, sent a note to the Judge, asking permission to come into Court, which being granted, they accordingly came ; and by their foreman, desired again to hear the testimony of the blacksmith and his son, who were called and repeated their testimony, much to the same purport as before, but said, that the prisoner upon being struck in the affray, fell up against or retreated to the side of the shop. The jury then requested the Judge again to state to them the law relating to excusable homicide. The Judge repeated in substance what he had before stated, with this further remark, that although it might be contended from some of the authorities which had been cited, that after a person assaulted had retreated as far as it was in his power, to avoid a battery or some great bodily harm, it would be excusable in him to protect himself from further injury, by killing his adversary ; yet he thought this was not a principle warranted by the law, but that the observations which he had before made and the limitations he had pointed out, coincided with the ideas of Sir Michael Foster, and were grounded in reason ; for, were it otherwise, the life of the citizen would be too easily endangered, and would be taken away at too easy a rate.

Aaron Ogden and *R. Stockton*, for the prisoner ;
Woodruff, Attorney-General, for the State.

KINSEY, Ch. J.—There are three grounds upon which

the counsel for the prisoner found their application for a new trial.

1st. It has been contended that the Judge who presided at the trial, misconceived the law when he charged the jury, that to excuse the commission of homicide as done *se defendendo*, it ought to appear the killing was through mere necessity, and to prevent his own destruction; otherwise, it amounted to manslaughter. The counsel have urged that this principle was laid down to the Court in too broad and unlimited a manner; that the apprehension of an enormous battery would equally excuse the killing of an adversary; and the circumstances of this case warrant the application of this principle of defence.

* * * * *

We come now to consider the most material question in the case, viz.: whether the offence proved to have been committed by the prisoner, comes up to the legal signification of the word manslaughter; and I am of the opinion that it does.

A reference to Nailor's case (Foster, 278) is sufficient to remove all doubt upon this point. In that case, the prisoner was indicted for the murder of his brother, and the circumstances, as they appear in evidence, were, "that the prisoner, on the night the act was committed, came home drunk. His father ordered him to go to bed, which he refused to do; whereupon a scuffle ensued betwixt the father and son. The deceased, who was then in bed, hearing the disturbance, got up, and fell upon the prisoner, threw him down and beat him upon the ground; and then kept him down so that he could not escape nor avoid the blows. While they were thus striving together, the prisoner gave the deceased a wound with a pen-knife, of which wound he died." Some doubt existed in the minds of the judges; a special verdict was found, stating the circumstances, and upon a conference with [of] all the judges of England it was unanimously holden to be manslaughter; "for there did not appear to be any inevitable necessity, so as to excuse the killing in

this manner.” In a note to this case, which I presume to be Foster’s, it is said the deceased did not appear to aim at the prisoner’s life, but merely to chastise him for his misbehavior and insolence towards his father.

In the present case, the attack of the deceased was without any kind of weapon that might have rendered it necessary for the prisoner to avail himself of the instrument which occasioned the death. On his own confession, much less [force] would have been sufficient; and I consider it, therefore, as clearly manslaughter.

What I particularly allude to is the declaration of the prisoner to the witnesses who have been sworn, made soon after the affray, that he could manage the deceased as he pleased, and that he was no more than a child. These declarations show that there could have been no necessity for the weapon, and they are proper to be relied upon. See also the case of *Rex v. Oneby*, 2 *Ld. Raym.* 1485.^a

The observations I have raised render it unnecessary to enter further into the discussion of the question I have raised, than to remark, that in my opinion, no man is justified or excusable in taking away the life of another, unless the necessity for so doing is apparent as the only means of avoiding his own destruction or some very great injury, neither of which appears in the present case.

Upon the whole, I am of opinion that there should be no new trial; for if justice has been done, and if the result of another trial ought to be the same as this, and the Court are decidedly of this opinion; though the judge may have directed the jury improperly, or have rejected evidence which, strictly speaking, ought to have been admitted, yet a new trial should not be granted, and would in no degree advance the ends of justice. *Edmondson v. Machall*, 2 *Tr. R.* 4.^b

^aThe discussion in *Oneby’s* case was confined to the question, whether the killing was murder or manslaughter.—Eds.

^bBut *Edmondson v. Machall* was a *civil* case. See also to the same effect in civil cases, *Cox v. Kitchen*, 1 *Bos. & Pul.*, 338; *Deerly v.*

In considering this question, I have purposely avoided mentioning many circumstances which operate strongly against the defendant—which show that he was full as eager for the combat as the deceased—that he manifested no inclination to decline the affray, which led to the unhappy circumstance which has brought down a just and severe punishment upon himself.

New trial refused.

PENNSYLVANIA v. ROBERTSON.

[ADDISON, 246.]

At Nisi Prius, Alleghany County, December Term, 1794.

EXPELLING TRESPASSER—MUTUAL COMBAT—CHARACTER OF DECEASED.

1. It is lawful for a person to exert as much force as is necessary to put a trespasser out of the house in which he lawfully is.

2. The defendant being engaged in combat with an Indian, who was armed with a knife, if there was no other way of escaping his rage, and the danger of his life, than by killing him by a blow dealt with a door-bar, it was but homicide in self-defence.

Dutchess of Mazarine, 1 Salk., 116; and cases cited in note (b) to *Cox v. Kitchen*, *supra*. In the United States, the rule is also probably of universal application in civil cases. Hilliard on New Trials, ch. 3. But in criminal cases, the authorities appear to be variant; and although there are doubtless many cases illustrating the question, yet the text books do not help us much in getting at them. Mr. Bishop does not attempt to collate the authorities on the subject. 1 Bish. Crim. Proced., §849. Mr. Hilliard's New Trials, ch. 7, and Mr. Wharton's Crim. Law, vol. 3, §3079 *et seq.*, give us very little light on the subject.

The better opinion seems to be, that the denial of any legal right in a capital case, is sufficient to reverse a judgment of conviction. *Phips v. State*, 3 Coldw., (Tenn.,) 344; *Pridgen v. State*, *post*; *Peck v. The State*, 7 Humph., 78, 88; *Cornelius v. The Commonwealth*, *post*; *Logue v. Commonwealth*, *post*. But we are unable to say whether or not this opinion is supported by the weight of authority. The question could not be discussed in a note of convenient length, and besides, such a discussion would be foreign to the purposes of this volume. It has been held, however, that an erroneous instruction upon the law of self-defence will not afford ground for setting aside a verdict of guilty in a capital case, if the evidence afford no hypothesis making such an instruction appropriate. See *Shorter's case*, *post*, and cases there cited to this point.

3. But if the defendant might have escaped, and if the blow was given in mutual combat, without necessity, either for the protection of his life, the possession of his house, or his right of entering it, the killing was manslaughter.

4. Evidence was admitted in this case of the character of the deceased, of his repute among his tribe, and of the fact that a portion of his tribe were hostile, and that the deceased was under strong suspicions of hostility; because these circumstances were sufficient to alarm the defendant for his safety, and induce him to use the force and weapon he did.

Robertson was indicted for the murder "of an Indian man of the Munsey tribe," on the 1st of May, 1794.

Robertson was in the employment of a contractor and in a house of his, at Fort Franklin, and was frying meat on the fire. The Indian came in drunk, and stepped across the frying-pan, as if to kick it over. Robertson bade him go out, and on his refusing, said he would put him out. The Indian persisting in his refusal to go out, Robertson proceeded to put him out. A struggle ensued, and both fell. Robertson got up first, and seized the Indian's feet to drag him out. When he had dragged him as far as the door, the Indian seized the door-post. Robertson called to some one present, to part the Indian from the door-post. The Indian said he would let go his hold. Robertson then let go his hold of the Indian's feet. On this, the Indian kicked Robertson with one of his feet in the face, so that the blood ran from his nose in a stream. Then the Indian got up and made at Robertson, who, thereupon, seized the bar of the door, which was of cherry-tree, three feet long, about three inches broad, and half an inch thick, and struck the Indian with the narrow side of it, on the side of his head, so that he instantly fell and died. The Indian was a strong man of about six feet high, much stouter than Robertson. He was standing outside the door, and between Robertson and the door. The bar was lying outside the door on the ground. The Indian had a knife. The Indians were generally at that time, supposed to be dangerous, so that the people durst not go out of the fort. The Munsey tribe, or part of them, were hostile; this man was under strong suspicions,

was a *bad Indian*, of no repute among his own people, who thought the killing of him not improper. Such was the case on the evidence.

Brackenridge & Collins, for the prisoner; *Galbraith*, for the State.

ADDISON, President.—The circumstances proved clear this case of all presumption of malice. The killing, therefore, is not murder.

Is it manslaughter? It was lawful for Robertson to exert as much force as was sufficient to put the Indian out of the house. It does not appear that he used more. After he had accomplished this, the Indian was the aggressor, by kicking Robertson with his foot. He was prosecuting his attack; “he made at Robertson.” He was a *savage*, a *drunken* savage, a savage naturally *ill-disposed*, *armed* with a knife, *stronger* man than Robertson; and his *nation* and *himself* were under strong suspicions of hostility. All these circumstances were sufficient to alarm Robertson for his own safety, and induce him to arm himself with a stick, to prevent the danger of the Indian’s attack, and save his own life by a stroke at the life of the Indian.

If you believe that Robertson might have otherwise entered the house or escaped, and that the blow was given in mutual combat, without necessity, either for the protection of his life, the possession of his house, or his right of entering it, the killing is manslaughter.

If you believe that there was no other probable way to get into the house, or otherwise escape from the rage of the Indian, and the danger of his life, than by the blow given, it is but homicide in self-defence.

If you believe it homicide in self-defence, you may acquit the prisoner on this indictment.

Verdict, Not Guilty.

NOTE.—This case would possess little value, but for the fact that it has been cited by the text-writers on Criminal Law, and bears upon a question still in dispute, namely, whether on a trial for homicide, where it is urged that the killing was done under a reasonable apprehension of death or

great bodily harm, evidence of the character of the deceased for violence is admissible. Upon this question, see Tackett's case, *post*, and those following it.

Mr. Bishop cites Robertson's case in connection with Lord Coke's definition of a reasonable creature in being, viz., "Man, woman, child, subject born, or alien; persons outlawed or otherwise attainted of treason, felony or premunire; Christian, Jew, Heathen, Turk or other Infidel, being under the king's peace." 2 Bish. Cr. Law, § 630; 3 Inst., 50. We may also add as an illustration of the same principle, the case of the State of Minnesota v. Gut. Two half-breed Indians had been arrested and confined in jail on suspicion of having murdered a white man. The defendant had joined a mob, and assisted in taking them out of jail and lynching them. He was convicted of murder, and appealed.

In delivering the opinion of the Supreme Court, WILSON, Ch. J., said: "The evidence offered to prove that a state of war existed between the United States and the Sioux Indians, and that the State, through its legal authorities, had offered a reward for the killing of any male of that tribe, was properly rejected. That it is legal to kill an alien enemy in the heat and exercise of war, is undeniable; but to kill such an enemy after he has laid down his arms, and especially when he is confined in a prison, is murder. The evidence that war existed between the Sioux Indians and the United States, and that the deceased was supposed to be a Sioux Indian, was therefore immaterial. It is not pretended that there was a law of our State authorizing the killing of a male of that tribe, and the proclamation or order of any officer of the State, could not make that right which is wrong, or legal which is illegal. If such a proclamation or order was made, and if on account thereof an ignorant person was misled into the commission of crime, it is for the Governor to determine whether that would be a proper case for the exercise of executive clemency."

The judgment was affirmed, and the sentence ordered to be executed. 13 Minn. 341, 357.

COMMONWEALTH v RILEY AND STEWART.

[THACHER'S CRIMINAL CASES, 471.]

*Municipal Court of the City of Boston, January
Term, 1837.*

PETER OXENBRIDGE THACHER, *Judge*.

THE RIGHT OF SELF-DEFENCE DISCUSSED IN GENERAL TERMS, AND THE
DISTINCTION BETWEEN JUSTIFIABLE AND EXCUSABLE HOMICIDE
SHOWN—DEFENCE IN MUTUAL COMBAT—COMBATANT MUST ENDEAVOR
TO RETREAT BEFORE KILLING—DEFENCE WITH DEADLY WEAPONS—
DEFENCE OF STRANGERS.

1. There are two kinds of self-defence: the one which is *justified* and

perfectly innocent and excusable; the other, which is in some measure blamable and *barely excusable*. [See note a to Selfridge's case, *ante*.]

2. There are cases in which a man may oppose force to force, even to the death. There are also cases in which the defendant cannot avail himself of the plea of self-defence, without showing that he retreated as far as he could with safety, and then, merely for the preservation of his own life, killed his assailant. A homicide committed under these circumstances is *excusable*, notwithstanding there may have been some fault in the defendant.

3. In the case of *justifiable* self-defence, the injured party may repel force by force in defence of his *person, habitation or property*, against one who manifestly intends and endeavors by *violence or surprise*, to commit a known *felony* upon either.

4. It is justly considered that the right in such case is founded in *the law of nature*, and is not, nor can be, superseded by any law of society. There being at the time, no protection from society, the individual is remitted for protection to the law of nature. [See Gray v. Coombs, *post*; Holmes' case, *post*; 1 Ruth. Inst. Nat. Law, ch. 16; Grotius, *de Jure Belli et Pacis*, Lib. II, Cap. I; Foster, 273.]

5. When a *known felony* is attempted on a person, as to rob or murder, the party assaulted may repel force by force; and even his *servant* then attendant upon him, or any other person present, may interfere to prevent mischief; and if death ensue, the party so interposing will be *justified*. In such cases, it is said nature and social duty co-operate. [Acc. Pond's case, *post*; Foster, 274.]

6. There is a species of self-defence known to the law, which, though involving fault to a certain extent, is yet *excusable*. The killing in such case is voluntary; the party having the intention to kill or to do some great bodily harm at the time the death happened, at least, but to have done it for the preservation of his own life. It arises from a *sudden casual affray* commenced and carried on in heat of blood; and supposes that the person when engaged in such sudden affray, quits the combat before the mortal wound is given, and *retreats or flies* as far as he can with safety; and then, urged by *mere necessity*, kills his adversary for the preservation of his own life. [As in Stoffer's case, *post*, which see.]

7. This last supposed case borders very nearly on *manslaughter*. [But it is excusable homicide. Stoffer's case, *post*.]

8. He, therefore, who, in the case of a *mutual conflict*, would excuse himself upon the grounds of self-defence, must show that before the mortal stroke was given, he had *declined any further combat*, and *retreated* as far as he could with safety; and also that he killed his adversary through mere necessity, and to avoid his own immediate death. [And his intention to withdraw in good faith, must have been clearly evinced to his adversary. Stoffer's case, *post*.]

9. If he fails in either of these circumstances, he will incur the penalty of *manslaughter*.

10. The foregoing principles applied to the evidence in this case.

11. Where a killing takes place in mutual combat, in determining

whether or not it was done in self-defence, the jury are to consider the relative strength and size of the parties. [Acc. Selfridge's case, *ante*, p. 23; and see Thompson's case, *ante*, p. 92, and Copeland's case, *ante*, p. 41. And it is the duty of the judge so to instruct the jury. Benham's case, *ante*, p. 115.]

12. Where, in an affray, A., who was much the stronger man, pursued B., and knocked him down and kicked him several times, while down, and then, after B. had got up and when he was walking away, knocked him down a second time; and thereupon C., a by-stander, gave B. a knife, openly and in the presence of all, and told B. to use his pleasure with it; and thereupon B., after having again endeavored to withdraw from the combat, killed A. with the knife; *it was held*—

a. If A. had knocked B. down, and stamped upon him with his foot, or kicked him in a vital part, B. might well use the knife in defending himself.

b. But if B. used the knife when his life was not in danger, and when he had no reasonable ground to fear any great bodily harm, he was guilty of manslaughter.

c. If B. was guilty of manslaughter, C. was likewise guilty, unless B. used the knife in a different manner and for a different purpose from that for which it was put into his hands by C. [As to the defence of other persons, see SUBDIVISION F of this PART, *post*.]

THACHER, J., charging the jury:

The defendants are on trial for the offence of having killed one James McNally, in this city, on the 7th day of November last. It is denominated, in law, manslaughter, which offence consists in the felonious and wilful or voluntary killing of another, without malice aforethought, which would make the killing murder, but without necessity to justify the deed, or accident to excuse it.

It is a case in which the public justice is interested; a fellow being has been suddenly, and by an act of violence, deprived of life; and it concerns the whole community to make solemn inquiry into the transaction, and to punish the bloody actors, if they have violated the law. Both these defendants are on trial for this offence, and it is for you to investigate their respective shares in the transaction, and to pass on the case of each as though they were severally on trial. One may be guilty, and not the other, and both may be innocent.

The government must satisfy you that James McNally

is dead, and that he came to his death in the manner which is charged in the indictment, before you can call on the defendants for their defence. That McNally is dead, is clearly proved and not denied; but that Riley killed McNally, is left to be inferred from the fact that they were engaged in a conflict in the street, Riley being armed at the time with a knife, and it appeared immediately afterwards that McNally had received a mortal wound in the abdomen, which, on the following day, terminated his life. But the evidence stops at a most interesting stage of the transaction.

We are apprised of facts to this extent only: After McNally had twice knocked Riley down in the street, and the latter had received from Stewart the knife, he passed from the street towards the sidewalk, followed by McNally. But while McNally followed Riley, and before he had reached him, Stewart begged McNally to go home. What was McNally's reply does not appear; for the witness says that McNally said something, which he did not hear, but ran to call the watch; and when he returned shortly after, the affray was over. You will naturally inquire, and be desirous to know what occurred between the men on the sidewalk. Did McNally press upon Riley and knock him down? Did Riley try to escape from his attack? Did he retreat to the wall? Or, was the attack so sudden and violent, and the danger so imminent, that no time was left for retreat? Did both or either fall, and was the wound in the abdomen the effect of accident or design? All these questions are important, and calculated materially to influence your minds. If the evidence has left this point in doubt, so that you cannot conscientiously say that you believe that Riley voluntarily inflicted that mortal wound upon the deceased, you must pronounce a verdict of acquittal for both defendants. The learned counsel on both sides have argued the case, as though you would come to the conclusion, that this mortal wound was voluntarily inflicted by Riley. If that should be your conclusion, then the question will be, whether it was a jus-

tifiable or an excusable act on his part. It is wholly immaterial from whom the facts come, whether from witnesses for the government, or for the defendants. But you must first ascertain the facts, and then judge of them according to the law.

The parties had been amusing themselves at a game of cards, during which, something had occurred which gave offence to McNally; and when he first left the house, and was at the gate, he threatened to flog both Riley and Stewart. He went back into the house, and on his return to the gate, he repeated his threats. Stewart came out and said to him, "Surely you will not think it worth your while to whip so small a man as me." Soon after, Riley came, and stepping to McNally, who stood opposite the gate, on the sidewalk, struck him, and immediately ran off across the street, and around a railing in front, on Bedford street.

Stewart then interfered, and said to McNally, "go home, McNally, and forgive Riley; he will not think of it in the morning." McNally replied, "the blow had no more effect on him than a blast of wind." Seeing Riley standing by the railing, he pursued him, and Riley ran some distance before McNally caught him. But Riley dodged him, and ran back to the witness, who still stood at the gate. McNally followed and knocked him down, near to the sidewalk; and then it was, while Riley lay on the ground and McNally was over him, that the witness says, "he saw McNally's foot going." Riley got up, and, saying it was too bad, walked off towards the middle of the street, when McNally followed, and knocked him down a second time. When Riley arose, Stewart went to him, and gave him a knife, and told him "to use his pleasure with it." This was done openly and in presence of all. But Riley still went off towards the sidewalk, and McNally followed him. The witness says that both before and after Riley had received the knife, he heard Stewart beg McNally, "For God's sake, to go home." During the whole affray, he says, nothing led him to suppose that Riley and Stewart, or either of them

wanted to fight with McNally; and that, with the exception of the blow at the gate, the fight was all on the part of McNally. The witness saw no signs of anger or vengeance in Riley or Stewart; but he says he expected, if McNally should again strike Riley, he might be tempted to defend himself with a knife, although he did not think Riley meant to kill McNally. He therefore ran for the watch to prevent further mischief.

It was under these circumstances that the wound was given by Riley to McNally; and if it was done to defend his own life, and to save himself from great bodily harm, it was within the principles of self-defence and justifiable in law. What is deemed in law the right of self-defence, is proper to be known by you.

The principles are the result of long experience and careful consideration of wise men. The law trusts nothing to rash discretion; but requires her ministers, in all cases, to regard former precedents, made by judicial tribunals after mature deliberation.

There are two kinds of self-defence: the one which is justifiable, and perfectly innocent and excusable; the other, which is in some measure blamable and barely excusable.

All the writers agree, says Sir Michael Foster, that there are cases in which a man may, without retreating, oppose force to force, even to the death. They all agree, also, that there are cases, in which the defendant cannot avail himself of the plea of self-defence, without showing that he retreated as far as he could with safety, and, then, merely for the preservation of his own life, killed the assailant. A homicide committed under these circumstances is excusable, notwithstanding there may have been some fault in the defendant. In the case of justifiable self-defence, the injured party may repel force by force in defence of his person, habitation, or property, against one who manifestly intendeth and endeavors by violence or surprise, to commit a known felony upon either. It is justly considered that the right in such case, is founded in the law of nature, and is not, nor can

be, superseded by any law of society. There being at the time no protection from society, the individual is remitted for protection to the law of nature.

Another principle of law is worthy of your notice at this time. Where a known felony is attempted upon the person, be it to rob or murder, the party assaulted may repel force by force; and even his servant then attendant upon him, or any other person present, may interfere to prevent mischief; and if death ensue, the party so interposing will be justified. In such cases, it is said nature and social duty co-operate. There is a species of self-defence known to the law, which, though involving fault to a certain extent, is yet excusable. The killing in such case is voluntary, the party having the intention to kill, or to do some great bodily harm at the time the death happened at least, but to have done it for the preservation of his own life. It arises from a sudden casual affray commenced and carried on in the heat of blood; and supposes that the person when engaged in such sudden affray, quits the combat before the mortal wound is given, and retreats or flies as far as he can with safety; and then, urged by mere necessity, kills his adversary for the preservation of his own life. This last supposed case borders very nearly upon manslaughter; and in fact and experience, the boundaries are in some instances scarcely perceivable; but in consideration of law they have been fixed. In both cases, it is supposed that passion has kindled on each side, and that blows have passed between the parties; but in the case of manslaughter, it is either presumed that the combat on both sides has continued to the time the mortal stroke was given, or that the party giving the stroke was not at that time in imminent danger. He, therefore, in the case of mutual conflict, who would excuse himself upon the ground of self-defence, must show that before a mortal stroke was given, he had declined any further combat, and retreated as far as he could with safety; and also that he killed his adversary through mere necessity, and to avoid his own immediate death. If he fails in either

of these circumstances, he will incur the penalty of manslaughter.

These principles are drawn from writers of the highest authority, and it belongs to you to apply them so far as they are applicable to the present case. Was it a mutual combat, or were the violent passion and the fight altogether on the side of McNally? Did he pursue Riley with a vengeful spirit? Did he use such force and violence as made Riley believe that his life was in danger, or that he was likely to sustain great bodily harm? In this connection you have a right to consider the relative size and strength of the parties and their disposition and character, as they have been proved on this trial. If you believe, that when McNally had knocked Riley down, he stamped upon him with his foot, or kicked him in a vital part, of which there is some evidence in the testimony of James Devenny, who saw the whole transaction, and in marks seen three days afterwards by Dr. Flint, on Riley's person; I will not undertake to limit his right to defend himself with his own feeble hand; but I consider that he might well defend himself with the knife which he received from Stewart. Had McNally taken the life of Riley, it would have been manslaughter; for, although Riley struck him at the gate, he immediately ran off, and there was no necessity for McNally to pursue him, however much his passions may have been roused by the affront. If Stewart believed at the time, that McNally intended to kill Riley, he had a right to interfere to prevent further mischief, and to give to Riley a weapon which was necessary for his defence.

But of all these facts and circumstances, you must judge. You represent the people, and the justice of the country, and you are bound by a solemn oath to pronounce a true verdict. There has been in this case as much testimony in favor of the mild and peaceable disposition of both the defendants and of their general character for meekness and forbearance under provocation, as is ever to be expected in a court of justice. Merchants and citizens of the best character have

attended to testify in their favor, in this hour of their peril; but if the government has made out a case of wilful and felonious killing to your satisfaction, against either or both of these defendants, you must find them guilty accordingly, notwithstanding their former good character. But if, after a deliberate review of all the circumstances of the case, it remains a doubt in your minds, whether they are guilty or innocent, the law permits you to throw the evidence of their good character into the favorable scale, and it is to weigh on the side of mercy. Still, however, if you believe that Riley used the knife when his life was not in danger, and when he had no reasonable ground to fear any great bodily harm, you must find him guilty; and, under the circumstances, Stewart must share the same fate, unless you should believe that Riley used the knife in a different manner, and for a different purpose from that for which it was put into his hands by Stewart.

The jury, after deliberating for about twenty minutes, returned a verdict of not guilty for both defendants.

Verdict, not guilty.

THE STATE v. SCOTT.

[4 IREDELL, 409.]

Supreme Court of North Carolina, June Term, 1844.

THOMAS RUFFIN, *Chief Justice.*

JOSEPH J. DANIEL, }
 WILLIAM GASTON, } *Judges.*
 FREDERICK NASH, }

MUTUAL COMBAT—KILLING WITH DEADLY WEAPON, MURDER—IMMINENCE OF THE DANGER—ACTING UPON APPEARANCES—PREVIOUS THREATS AND HOSTILE CONDUCT—FAILURE TO GIVE PROPER INSTRUCTIONS NOT ASKED FOR, NO GROUND OF REVERSAL.

1. In a case of homicide, where it appeared that the deceased had

threatened the prisoner about three weeks before that he would kill him ; that they met in the street on a starlight night, when they could see each other ; that deceased pressed for a fight, but the prisoner retreated a short distance ; that when the deceased overtook him, the prisoner stabbed him with some sharp instrument, which caused his death ; and that at the time of this meeting the deceased had no deadly weapon : *Held* that this was murder.

2. In such a case, to mitigate the offence from murder, it must appear, from the previous threats and the circumstances attending the rencounter, that the killing was in self-defence.

3. Where the deceased intended only a fight without weapons, and that was known to the prisoner, and the prisoner drew his knife without notice to the deceased, even if they actually engaged in the fight, the stabbing of the deceased by the prisoner would be murder.

4. The belief that a person designs to kill me will not prevent my killing him from being murder, unless he is making some attempt to execute his design, or, at least, is in an apparent situation to do so, and thereby induces me reasonably to think that he intends to do it immediately. [Acc. Lander's case, *post* ; Harrison's case, *ante* ; Creek's case, *post* ; Cotton's case, *post* ; Rippy's case, *post* ; Collins' case, *post* ; Dyson's case, *post* ; Williams' case, *post* ; Evans' case, *post* ; and others. Contra. Grainger's case, *post* ; Philip's case, *post* ; Carico's case, *post* ; Bohannon's case, *post* ; Young's case, *post*.]

5. Where the prisoner prayed for instructions only on the ground that the deceased did intend to kill him, and not on the ground of a reasonable belief on his part that the deceased did so intend ; the Court did not err in omitting to instruct the jury on the latter point.

6. DANIEL, J., dissented, and was of opinion that a new trial ought to be granted, because the record did not show that the Court charged the jury that the prisoner should be acquitted, if from the character of the assault and the surrounding circumstances, in connection with the antecedent conduct and threat of the deceased, he had *reasonable grounds* to believe that a felony was about to be committed on his person ; and this, notwithstanding that it did not appear that the prisoner had specifically prayed such an instruction.

Appeal from the Superior Court of Law of New Hanover County, at Fall Term, 1843, his Honor, Judge BATTLE, presiding.

The prisoner was indicted for the wilful murder of one Madison Johnson. On the trial, the following evidence was introduced, to-wit :

Alfred Johnson, a brother of the deceased, was examined for the State, and testified, that on a certain evening, in the month of March last, he went to the house of Hagar Nutt, in the town of Wilmington ; that

Alfred Smith, Henry Cowan, James Holmes, the deceased and the prisoner were there; and after remaining a short time, left and went off together; Holmes, Smith and Cowan being a little ahead, and the deceased, the prisoner and witness walking on a short distance behind; that it was in the night, with no moon, but a bright starlight; that the deceased and the prisoner had some words, but did not quarrel or seem angry; that the prisoner struck the deceased, upon which he fell and immediately expired; that the prisoner ran off, but returned upon his calling him, and as soon as he saw that the deceased was cut and bleeding, he ran off again; that he had never heard the deceased threaten the prisoner, and the parties did not touch each other until the prisoner struck the deceased; that the deceased had no weapon in his hand, and none was found upon his person after death.

Alfred Smith, another witness for the State, testified, that he was at Hagar Nutt's at the time spoken of by the first witness, and went off in company with the others; that the deceased did not start with them, but came through a gate on the premises and called for the prisoner, who at first did not answer, but upon a second call, asked the deceased what he wanted, to which he replied, by calling him a damned rascal; that the prisoner then asked him what was the matter, and told him to come up and reason the matter before the gentlemen, to which deceased replied, that the gentlemen had nothing to do with this business; that he walked on a little ahead, and looking back, saw the deceased and prisoner moving backwards and forwards, as if they were trying to get together, but Alfred Johnson was between them, keeping them apart; that he heard no angry words, nor saw nor heard any scuffle, but heard the prisoner tell the deceased that he wished to have nothing to do with him, and that he did not see the prisoner strike any blow, but saw him running off.

Dr. Dickson was then called, and testified for the State, that the wound was inflicted by a long, narrow,

sharp instrument, and from its appearance must have been instantly fatal.

For the prisoner, Henry Cowan, James Holmes, Mr. Grant and Charlotte Mitchell were examined.

Henry Cowan swore that he left Hagar Nutt's in company with the others; that he walked on before, and heard the prisoner and the deceased quarrelling, and saw Alfred Johnson trying to prevent a fight; that prisoner backed, and the deceased followed him eight or ten steps up the hill; that he saw the prisoner running off; that he thought the prisoner was afraid of deceased from his giving back.

James Holmes testified, that he left Hagar Nutt's with the others; that the prisoner left the house singing, and the deceased came afterwards, calling for the prisoner; that the prisoner asked what he wanted, to which the deceased replied, that he would soon let him know; that he saw the prisoner and the deceased moving backwards and forwards as if they wanted to fight, but Alfred Johnson kept them apart; that he saw the deceased stoop down as if he intended to pick up something, and that soon afterwards he saw the prisoner running, and asked what was the matter, to which prisoner replied, "nothing," and witness said to him that he had done something, or he would not run.

Mr. Grant stated, that about three weeks before this transaction, he saw the prisoner and the deceased have a fight, when the deceased struck the prisoner on the head with a brick-bat, and the prisoner seemed to wish to avoid the fight; that he heard the deceased say he would kill the prisoner if there were no other negro left in the State, and that he informed the prisoner of the threat.

Charlotte Mitchell swore, that about a fortnight before the killing, the deceased came to her house in company with Alfred Johnson, his brother, and seemed very anxious to see the prisoner, who boarded with her; that the deceased found the prisoner's cap and tore it up, saying, that he would serve the prisoner in the same

way if he could find him; and that he intended to kill him at the risk of his life; that Alfred Johnson heard this, and told his brother that they could find the prisoner another time; that she also heard the deceased threaten to kill the prisoner the Friday night before his death; that the deceased had been on good terms with a yellow girl named Maria Mitchell, but had had a falling out with her, and she had come to stay at witness's house, where the prisoner was boarding. She testified also, that the prisoner was rather a stouter man than the deceased, both being young men.

Mr. Elfe stated, that he thought the prisoner and the deceased were about the same size.

The prisoner, the deceased, and all the witnesses, except Messrs. Grant and Elfe, were colored persons.

Upon this case, the prisoner's counsel insisted that the killing was in self-defence, or at most, upon a legal provocation, and requested the Court to instruct the jury, that if they believed that the deceased had threatened to take the prisoner's life, which was known to the prisoner, and the prisoner gave back, and the deceased followed him, (as stated by the witness Cowan,) then the killing was either excusable homicide in self-defence, or, at most, a case of manslaughter.

The Court instructed the jury, that if Alfred Johnson's account of the transaction were the correct one, it was undoubtedly a case of murder; but if they did not believe his account to be true, then, if they found from the evidence of the threats having been used by the deceased, taken in connection with the testimony given by the witnesses Smith, Cowan and Holmes, or either of them, that the deceased was assailing the prisoner in such a manner, that he had no means of saving his life, or his body from some great hurt, but by killing the deceased, he had a right to do so, and it would be a case of excusable homicide in self-defence; that if they did not take that view of the case, but found that the parties were engaged in a scuffle, during which the prisoner killed the deceased, it was a case of manslaughter; but

that if the parties were only trying to get together, and no blows had passed, or if the prisoner had given back and the deceased had followed him, as stated by Cowan, but the deceased had stricken no blow, and had no weapon in his hand or about him, and the prisoner struck him with a weapon likely to produce death, then the killing was murder.

The jury found the prisoner guilty of murder; upon which he moved for a new trial, upon the ground of misdirection. The motion was overruled and sentence of death pronounced, from which the prisoner appealed.

The *Attorney-General* for the State; *No Counsel* in this Court for the defendant.

RUFFIN, Ch. J.—The instructions to the jury seem to be fully responsive to the prayer of the prisoner, and we do not perceive in them, as given, any error to the prejudice of the prisoner. The killing was, unquestionably, not from necessity in defence of the prisoner's person. Lord Hale says, that it must appear plainly by the circumstances of the case, as the manner of the assault, the weapon, or the like, that the party's life was in imminent danger—otherwise, the killing of the assailant is not justifiable self-defence. 1 P. C., 484. And Mr. East lays it down, "that a bare fear, however well grounded, that another intends to kill one, unaccompanied with any overt act, indicative of such intention, will not warrant the latter in killing the other by way of prevention; *there must be an actual danger at the time.*" 1 East P. C., 273. There was here no danger of the prisoner's life or great bodily harm; for the deceased had no deadly weapon, nor any means of doing the prisoner such harm, and in no manner, at the time, indicated an intention to do so, and they were nearly of the same strength. But notwithstanding the defect of evidence of any contemporaneous purpose or ability, on the part of the deceased, to kill the prisoner, the Court left to the jury the enquiry of the fact, whether the deceased was assailing the prisoner in a deadly manner; which the jury found

against the prisoner. He has, therefore, no cause of complaint on this point. The instructions asked, are then to be considered in reference to the position, that the killing was not more than manslaughter. The prayer was, that if the deceased had threatened to take the prisoner's life, which was known to him, and he gave back, and the deceased followed him, as stated by Cowan, then the killing was only manslaughter. As to the threat, it must have been that proved by Grant to have been made three weeks before, as that alone was communicated to the prisoner. We do not perceive how that can mitigate the offence. If it has any effect, it tends to show that the killing was not on heat of blood, but both intentional and of previous purpose; and, therefore, it would be murder, unless from the threats and circumstances attending the encounter, it should appear, that it was necessary in self-defence, which we have already seen was not so. But, notwithstanding this consideration, his Honor did beneficently put it to the jury, that if the parties became engaged in a scuffle, during which the prisoner killed the deceased, it would be but manslaughter. Now, in the case of mutual combat upon words of reproach or other sudden provocation, if one of the parties takes an undue advantage, as by drawing his sword, and making an assault, before the other has an opportunity to draw his, it is settled, that it is murder. And so here, where one of the parties drew his knife without notice to the other, who expected only a fight, without weapons, as the other knew, it would seem, even if they actually engaged in the fight, that the former stabbing the other must be murder; for it is plain, that the slayer intended a fight as well as the other, but he did not intend a fair fight, as a trial of natural strength, but sought the other's blood. But in this case, there was no actual combat prior to the mortal blow. Under the prayer and instructions we are to consider the case as to this point, upon the testimony of Cowan alone, laying aside that of A. Johnson and the other witnesses. Cowan states, that both parties were

quarrelling, and that A. Johnson was trying to prevent a fight between them, when his attention was drawn to them; that he then saw the prisoner back, and the deceased follow him eight or ten steps; that he saw no scuffle nor blow given by either party, but saw the prisoner run off, which was, no doubt, immediately after giving the first fatal blow. Upon this evidence, by itself, it is clear, that it is murder. Two men meet in the street, and, upon angry words on both sides, one of them offers a fight, and the other retreats a few steps, but without declining to fight. Instead, however, of fighting, as was expected by the other, without arms, he that retreats had either during the quarrel drawn his knife and meant by his retreat to draw the other on, or he fell back until he could draw his knife, and then, without warning his adversary to keep off, and as soon as he got within reach, and before he had made a blow, he stabbed him so as, with a single stroke, to take his life upon the spot, and immediately fled.

The prisoner not only took undue advantage of the deceased, but he took it while he meant the deceased to believe that they were to fight on an equality; which argues, not sudden passion, but a wanton and cruel thirst for blood. If to these circumstances be added that of the deceased's threat three weeks before, the case is rather aggravated than mitigated. For it tends to raise a presumption of a previous mutual grudge, which the one party was then seeking to gratify in an ordinary fight, and the other to gratify fatally, under the pretence of a sudden mutual combat, in which, though his adversary thought it was to be fair, he meant to take, and secretly did take, an undue and fatal advantage.

In consultation it occurred to us at one time, that the case might properly have been left to the jury favorably to the prisoner, on the principle of *Levet's case*, Cro. Car., 538; which is, that if the prisoner had reasonable ground for believing that the deceased intended to kill him, and under that belief slew him, it would be excusable, or at most manslaughter, though in truth, the de-

ceased had no such design at the time. To that purpose the jealousy of the deceased, the previous fight in which the deceased took an undue advantage, his threat, his readiness again to quarrel and fight, and the time being night, in which the deceased might be armed without the prisoner's discovering it, would be material. But the Court is satisfied, for several reasons, that the prisoner can take no benefit from that principle. The belief that a person designs to kill me will not prevent my killing him from being murder, unless he is making some attempt to execute his design, or, at least, is in an apparent situation to do so, and thereby induces me reasonably to think that he intends to do it immediately. Here there certainly was no such purpose then in the mind of the deceased, as he had no weapon of any sort. Nor did the prisoner have any just reason to think the deceased so designed then; for although it was night, yet it was bright starlight, so that all the company could see each other distinctly, and the prisoner must have seen that the deceased was not armed, or that, at least, he did not appear to be armed. The most then, that could be made of it would be, that the prisoner may have thought that the deceased might be armed, and therefore, that he might then intend to kill him. But such a remote conjecture will not authorize one man to kill another. There might have been more in it, if the deceased had been lurking on the way of the prisoner, in the dark, where he could not tell whether he was armed or not, but might presume from his ill-will towards him and the situation in which he was found, that he was. But it cannot apply to a case where there is light enough for the parties to know each other, and upon a mutual quarrel they begin a fight, in which neither party appears to be armed, and one of them secretly prepares a deadly weapon, with which he assails and kills the other, who in reality was, as he appeared, not armed. Besides, the prisoner did not allege in his defence, that he believed at the time that the deceased intended to kill him, and under that belief he

slew him. He prayed for instructions on the allegation, that the deceased did intend to kill him, and not on the prisoner's reasonable, though mistaken belief, that he so intended. As the prisoner alone, positively knew the state of his own mind on that point, and he did not bring forward the idea of such a belief having been entertained by him, the Court and jury could not presume it. Moreover, it has often been decided, that according to the constitution of this Court, we cannot reverse a judgment because it does not appear in the record that the verdict ought to have been given, but only for error apparent in the decision of the Court. Therefore, an omission to give instructions that might have been proper if asked, is not error, but only the giving of wrong instructions, or refusing right ones when asked. We do not know in this case, that the Judge did not submit this enquiry to the jury; for the evidence and occurrences of the trial are not fully set forth in any case, but the appellant states only so much as is material to the points on which he excepts to the opinion of the Court. But, at all events, it does not appear that the prisoner prayed any instructions on this point, and therefore he cannot complain of the omission. There is no error in the judgment; which will be certified to the Superior Court.

DANIEL, J., dissenting:

There is not a particle of evidence in the case, which would authorize the Court and jury to say, that the prisoner had *malice aforethought express* against the deceased; but there is abundant evidence, that the deceased had *express malice* against the prisoner. The prisoner in the night time left the house of Hagar Nutt, whistling and apparently in a good-humor. The deceased said nothing to him in the house, but as soon as the prisoner left the house and was in the dark, he hailed him; and, on being civilly answered by the prisoner, returned the answer by curses and abusive language; and then refused to submit his complaint, whatever it was,

to the award of the company, but said, he should let the prisoner know what he wanted, when he should come up with him. He did come up, and immediately an effort for combat ensued between the parties. The prisoner, being a little loth to enter into it, retreated. The deceased pressed on him, and in his advance stooped down, as if in the act of picking up something, and at that moment the prisoner gave him one blow with a deadly weapon, as it seemed from the nature of the wound, for the instrument was not seen by any of the company, from the darkness of the night, or some other cause. From this evidence, the prisoner was guilty of murder by malice implied in law, unless than he had a *reasonable ground to believe* that a felony was intended and about to be committed on him by the deceased. If he then had such a reasonable ground of belief, although it turned out in fact, that no felony was intended by the deceased, still it was not in law a case of murder. East's P. C., ch. 5, §46; 1 Hale, 470; Foster, 299. Notwithstanding this was the only ground of defence the prisoner had, the Court did not, as far as we can learn from the case sent up here, inform the jury that such was the law, nor does it appear that the Court said one word to the jury upon this, the only possible ground the prisoner had to escape the charge of murder. The jury, it seems, were left entirely uninformed and in the dark, as to the law on this point of the case. And whether the prisoner had then a reasonable ground to believe the deceased meant to take his life, was a matter of fact for the determination of the jury, and not for the decision of the Court. Take all the evidence in the case, and it seems to me, that the prisoner had strong grounds to suspect, that then was the time the deceased was about to take his vengeance on him, on account of his jealousy of his mistress, and also to execute his previous threats. These threats had been told to the prisoner; and he must have known, that about a fortnight before, the deceased had torn to pieces his cap, and also the threat

he then made. It being done at his boarding-house and in the presence of the inmates of the house, they must have told him of it. But it is now said for the State, that this Court cannot see from the case sent here, that the prisoner's counsel prayed the Court to charge the jury, that if the prisoner had a reasonable ground to believe that the deceased intended then to kill him, there in the dark, it was not a case of murder. The prayer is not very definite on this point, I admit; but the counsel did pray the Court to inform the jury, that from the evidence the prisoner was not guilty of murder, but that it was only a case, at most, of manslaughter. The Court charged, that as the deceased was unarmed, and had not stricken the prisoner a blow, or even touched him, the slaying with a deadly weapon was murder. So far, there can be no complaint of the charge; nor do I perceive from the case, that any objection had been raised on the trial to a principle of law so plain, if the prisoner knew that the deceased was unarmed. If the Judge had continued on his charge and told the jury, that even if the deceased was then unarmed, and it afterwards appeared that the deceased did not then intend to commit a felony on the prisoner; still, if from the antecedent threats and conduct, and the then language and conduct of the deceased, and the darkness of the night, the prisoner believed that the deceased was armed with a dirk or other deadly weapon, and intended to kill him, then it was not a case of murder. I say that such a charge would have covered the whole case. The prayer of the counsel, it seems to me, covered the last ground in the case, as much as that upon which the Judge spoke; and as the Judge did charge, his charge, I think, should have extended to that part of the law, on which the prisoner had some right to expect his case to be taken out of the crime of murder. I think the prisoner should have his case put to another jury.

Per Curiam: Ordered that it be certified, there is no error in the judgment below.

Judgment affirmed.

NOTE.—The dissenting opinion of DANIEL, J., in this case, commends itself strongly to favor. If the facts of the case warranted the Court in charging at all with reference to the law of self-defence, the prisoner had the right to have the law on that subject fully and not partially charged, so far as it was applicable to his case. This manifestly was not done. Upon the whole, this looks very much like a case where a man was judicially compelled to suffer death because of a mistake or inadvertence of his counsel, either in omitting to request the proper instructions, or else in defectively making up his bill of exceptions, so that the record did not show that a proper instruction was requested and refused. It would be an inhuman rule of law that would require an ignorant defendant in a criminal case, to suffer through the manifest mistake or omission of his counsel. Such a rule would be scarcely more tolerable than that which obtained until a recent period in England, which denied the prisoner the benefit of counsel altogether in capital cases, and compelled an illiterate prisoner to defend his own case, pitted against the highest legal skill the government could bring against him, except where points of law were to be debated.

The ruling on this point is calculated to arrest attention from the further fact, that the prisoner in this case was without counsel in the Supreme Court.

The importance of the jury being properly instructed upon the point alluded to, in cases of this kind, may be inferred from examining Selfridge's case, *ante*, pp. 17, 18; Neeley's case, *ante*, p. 96; Sullivan's case, *ante*, p. 65; Shorter's case, *post*; Logue's case, *post*; Maher's case, *post*; Meredith's case, *post*, and Pond's case, *post*.

ISAACS v. THE STATE.

[25 TEX., 174.]

Supreme Court of Texas, Galveston, 1860.

ROYALL T. WHEELER, *Chief Justice.*

ORAN M. ROBERTS, {
JAMES H. BELL, { *Associate Judges.*

NON-FELONIOUS ASSAULT—MUTUAL COMBAT—THE ASSAILED NOT COMPELLED TO RETREAT—THE LAW OF SELF-DEFENCE EXPOUNDED.

1. If killing is done in the necessary defence of the slayer, that is, to protect or save himself from immediate and imminent danger of death, or great bodily harm from the violence of the deceased, which was not provoked or sought for by the slayer, and which cannot be avoided by any other means except retreating, then it is not an unlawful killing, but justifiable homicide.

2. If, however, it is committed not in necessary self-defence, and not from a contest provoked or sought by the slayer, but in course of a sudden affray or contest, and under the immediate influence of sudden passion, produced by an adequate cause, as a violent blow, then or immediately before inflicted, then it is manslaughter, unless [in Texas] committed with a dagger. But if it is not justifiable, and is not committed in a sudden quarrel, and under the influence of sudden passion, arising from an adequate cause, or if done with a dagger, then it is murder in the second degree.

3. If the person assailed can with safety avoid the conflict and all danger by other means than *killing* or *retreating*; or, if at the time of the killing, he is not in immediate danger of serious bodily harm then about to be inflicted; or if he sought the contest and provoked the attack on himself in revenge for previous difficulties or quarrels,—then he is not justifiable in killing his antagonist, but is guilty either of murder or of manslaughter.

4. Homicide is permitted and justified by law, when inflicted for the purpose only of preventing an unlawful and violent attack on one's person, of such a nature as to produce a reasonable expectation or fear of death, or great bodily harm about to be inflicted.

5. In other words, the killing must take place while the person killed is in the very act of making such unlawful and violent attack, and under such circumstances that the person assailed cannot resort to other legal means to save and protect himself, except retreating or running, which he is not bound to do.

6. If the party has time and opportunity, with safety to himself, to resort to other means to protect himself, then he is not justifiable in killing. It is the necessity of the case, and that alone, which justifies the killing. On that necessity, the right to kill rests, and when the necessity ceases, the right no longer exists.

7. This limitation which the law puts on the right of self-defence is founded on the same law of nature and reason which gives the right of defence; and it does not restrain it, but protects it, and prevents its abuse by those who would, under its color and the pretence of defence, seek to gratify revenge, or an occasion to kill. [But, query? for it seems the right of defence as it exists in a state of nature is modified in several particulars by the municipal law. See 2 Ruth. Inst. ch. 16: Gray v. Coombs *post.*]

8. Where the slayer provoked the deceased by profane language and angry gesticulations to strike him a blow with a stick, which was not followed up in such a manner as to produce a reasonable expectation or fear of death or some serious bodily injury, and which did not endanger life; *held* that he could not be justified on the ground of self-defence, in retreating out of danger, drawing a dagger, returning to the conflict and killing his antagonist.

Indictment against Abraham Isaacs for the murder of Samuel F. Spillar. The defendant had been occupying a room of the office of the deceased, using it in carrying on his business of a shoemaker. Complaint had been made to the deceased that the defendant annoyed the

school girls in passing by, by looking at them out of his window and speaking to them, and was requested to have the annoyance corrected. The deceased replied that the defendant was a good man, and only required to be advised as to his behavior; and promised that it should cease. The deceased thrice closed the window by tacking cloth over it, which the defendant thrice removed. The last time, which was before breakfast on the morning of the difficulty, whilst in the act of tacking the cloth, the defendant drew his dagger on the deceased, who left the room and went to his residence and obtained a shot-gun. The defendant stated, in connection with a declaration to one of the witnesses of having drawn the dagger, that the deceased drew on him his shot-gun, and that he was afraid to return to the office for fear the deceased would shoot him. The deceased threw the defendant's tools out of the office, and the defendant went away and engaged a wagon to remove them. During the morning, on his return towards the town of Waverly, (in which the office was situated,) in company with one Fitzpatrick, with whom he had fallen in at Emore's, (to whom he had applied for the wagon,) at the school-house he was told by two of the students that Dr. Spillar, (the deceased,) was at his office and wished to see him and have a settlement before he left for Danville, where he was going that morning. A conversation ensued concerning the difficulty that had taken place. One of the boys told the defendant that Dr. Spillar was not angry with him. The defendant replied, "he would kill him; that he had thrown his tools out of the office." On cross-examination, the witness said that the defendant is a foreigner, and speaks English badly; that some portion of the remark he did not understand, but that he heard the word "kill." The defendant then asked Fitzpatrick to go with him to the office, where they went accordingly.

One of the school-boys had been sent to inform Dr. Spillar that the defendant was coming. On receiving the message he said he was glad of it, as he wished to

have a settlement with him before he left Montgomery county; and requested the youth to bring his stick from the office, which he accordingly did. The deceased placed the stick on a stump where he was mending his saddle.

The deceased was thus engaged when the defendant came up. The former remarked that he wanted no difficulty; the latter replied to the same effect. The defendant commenced cursing and using abusive epithets towards the deceased, and shook his fist in his face. The deceased replied, "if he did not go away, he would frail him with a stick." He continued talking and shaking his hands at the deceased, who then struck him with the stick. The defendant then retreated twenty or thirty feet, drew his dagger and returned upon the deceased with it. The latter then struck him with the stick a second time, and was retreating when he struck the third blow, which knocked the defendant down on his knees. He arose, caught the deceased by the collar, and stabbed him with the dagger, from which he died. A different version of the affair was given by Fitzpatrick, who was drunk when he testified, and who, as the former witness stated, was not in a position to see the first part of the difficulty.

The Court, among other things, charged the jury: "That if the killing was done in the necessary defence of the slayer, that is, to protect or save himself from immediate and imminent danger of death or great bodily harm from the violence of the deceased, which was not provoked or sought for by the slayer, and which could not be avoided by any other means except retreating, then it would not be an unlawful killing, but justifiable homicide. If, however, it was committed, not in necessary self-defence, and not from a contest provoked or sought by the slayer, but in course of a sudden affray or contest, and under the immediate influence of sudden passion, produced by an adequate cause, as a violent blow, then or immediately before inflicted, then it would be manslaughter, unless it was committed with a dag-

ger. But if it was not justifiable, and was not committed in a sudden quarrel, and under the influence of sudden passion, arising from an adequate cause, or if done with a dagger, then it would be murder in the second degree."

The charge of the Court proceeded to define the elements of murder in the first and second degrees, and also what constituted manslaughter, and also the doctrine of self-defence as a justification. On the last head, the Court charged the jury that "homicide is permitted and justifiable by law, when inflicted for the purpose only of preventing an unlawful and violent attack on one's person, of such a nature as to produce a reasonable expectation or fear of death, or great bodily harm about to be inflicted. In other words, the killing must take place while the person killed was in the very act of making such unlawful and violent attack, and under such circumstances that the person assailed cannot resort to other legal means to save and protect himself, except retreating or running, which he is not bound to do.

"If the party has time and opportunity, with safety to himself, to resort to other means to protect himself, then he is not justifiable in killing. It is the necessity of the case, and that only, which justifies the killing. On that necessity the right to kill rests, and when the necessity ceases, the right no longer exists. This limitation which the law puts on the right of self-defence, is founded on the same law of nature and reason which gives the right of defence; and it does not restrain it, but protects it and prevents its abuse by those who would, under its color and the pretence of defence, seek to gratify revenge or an occasion to kill."

* * * * *

"If, then, under these rules, you believe the accused acted only in his necessary self-defence, you will find him "not guilty"; but if you believe otherwise from the facts, that the accused might with safety to himself have avoided the conflict and all danger, by other means than killing or retreating; or that at the time of the kill-

ing he was not in immediate danger of serious bodily harm then about to be inflicted, or that he had sought the contest, and provoked the attack on him in revenge for previous difficulties or quarrels, then he was not justifiable, and you will inquire whether the killing was manslaughter or murder."

The jury found the defendant guilty of murder in the second degree, and assessed his punishment at confinement in the penitentiary for twenty years. Judgment in accordance with the verdict.

Branch & Abercrombie, for appellant; the *Attorney-General* and *A. P. Wiley*, for the appellee.

BELL, J.—The third specification in the assignment of errors is, that the charge of the Court is contrary to the law, but in the briefs furnished by counsel, no error in the instructions given by the Court to the jury is pointed out. We are of opinion that the charge of the Court is free from error, and contains a very full exposition of the law of the case. It is clearly shown by the testimony that the wound which caused the death of Dr. Spillar, was inflicted by the appellant with a dirk or dagger. Article 610 of the Penal Code provides that "if any person be killed with a bowie knife or dagger, under circumstances which would otherwise render the homicide a case of manslaughter, the killing shall nevertheless be deemed murder, and punished accordingly."

It follows that the judgment of the Court below against the appellant must be affirmed, unless it can be established that the evidence shows a case of excusable or justifiable homicide. If the killing took place under circumstances which would otherwise render it a case of manslaughter, then it is elevated to the degree of murder by the provision of the code, because a dagger was the weapon used by the slayer. We are of opinion that the evidence shows very clearly that the accused was under no necessity to take the life of Dr. Spillar at the moment when he struck the fatal blow. It is true that the deceased struck the first blow, being excited to do so by

the profane language and the angry and insulting gesticulations of the accused. Dr. Spillar may not have been legally justifiable in striking the blow, but the accused was not justifiable in making the assault by Spillar the occasion of taking his life. It is not shown that Dr. Spillar offered to follow up his first blow by a further assault; but it is shown that the accused retreated twenty or thirty feet after Dr. Spillar struck the blow, drew his dagger and returned to the conflict. His life was not in danger. He used greater force than he was justifiable in using, and the jury could not properly have declared by their verdict that the homicide was in the necessary defence of his person from an unlawful attack, which produced reasonable expectation or fear of death, or of some serious bodily injury. The accused provoked the blow which was dealt by Spillar, who is shown to have been a mild and peaceful man, and it would be subversive of every principle of the criminal law to hold that a man was justifiable in taking the life of another who, under much provocation, had struck a single blow without following it up in such a manner as to endanger life. As has been before said, if the killing was not justifiable, it was at least manslaughter, and if manslaughter from its other circumstances, then it became murder because of the use of the dagger.

The judgment of the Court below is affirmed.

Judgment affirmed.

NOTE.—The charge of the district judge in this case, which is approved by the Supreme Court, is so manifestly at variance with all the authorities, American and English, on the question of retreating before killing, that it would be a waste of time to institute any comparisons on this point. This was not a case of surprise or sudden attack, or of felonious assault or attempt, but a case of mutual combat, quarrel, conflict or affray, where the contest was voluntarily entered into, and not unexpected by either party. It was hence a case where, by all the common law authorities, either party would have been required to withdraw, or to endeavor fairly to withdraw from the combat, before he could justify killing in self-defence. We doubt whether a case can be found in the books from which a contrary conjecture can be drawn, unless it be that of Copeland, *ante*, p. 41, which is silent on the subject.

Nevertheless this ruling seems to be in entire conformity with the Texas statute on the subject of homicide in defence of person or property. This

statute exhibits such a manifest attempt to provide for every possible contingency that may arise, departs in so many particulars from the common law, and is so entirely different from any other American statute on the subject which we have seen, (the others simply declaring the common law as laid down by approved authorities), that it may not be amiss to quote it in full :

“Homicide is permitted in the necessary defence of person or property, under the circumstances and subject to the rules herein set forth.” Penal Code, Art. 567 ; Paschal’s Digest Tex. Laws, Art. 2225.

“Homicide is permitted by law, and subject to no punishment, when inflicted for the purpose of preventing the offences of murder, rape, robbery, maiming, arson, burglary, and theft at night, whether the homicide be committed by the person about to be injured, or by some person in his behalf, when the killing takes place under the following circumstances :

1. It must reasonably appear by the acts, or by the words coupled with the acts of the person killed, that it was the purpose and intent of such person to commit one of the offences above named.
2. The killing must take place while the person killed was in the act of committing the offence, or after some act done by him, showing evidently an intent to commit such offence.
3. It must take place before the offence committed by the party killed is actually completed, except that, in case of rape, the ravisher may be killed at any time before he has escaped from the presence of his victim, and except also in the cases hereinafter enumerated.
4. Where the killing takes place to prevent the murder of some other person, it shall not be deemed that the murder is complete so long as the offender is still inflicting violence, though the mortal wound may have been given.
5. If homicide takes place in preventing a robbery, it shall be justifiable, if done while the robber is in the presence of the person robbed, or is flying with the money or other article taken by him.
6. In case of maiming, the homicide may take place at any time while the offender is mistreating with violence the person injured, though he may have completed the offence of maiming.
7. In case of arson, the homicide may be inflicted while the offender is in or at the building or other property burnt, or flying from the place before the destruction of the same.
8. In cases of burglary and theft by night, the homicide is justifiable at any time while the offender is in the building, or at the place where the theft is committed, or is within gunshot from such place or building.” Penal Code, Art. 568 ; Pasch. Dig., Art. 2226.

“When the homicide takes place to prevent murder or maiming, if the weapons or means used by the party attempting or committing such murder or maiming, are such as would have been calculated to produce that result, it is to be presumed that the person so using them designed to inflict the injury.” Penal Code, Art. 569 ; Pasch. Dig., Art. 2227.

“Homicide is justifiable also in the protection of the person or property against any other unlawful and violent attack besides those mentioned in the preceding article, and in such cases, all other means must be resorted to for the prevention of the injury, and the killing must take place while the person killed is in the very act of making such unlawful and violent attack, and any person interfering in such case, in behalf of the person about to be injured, is not justifiable in killing the aggressor, unless the

life or person of the injured party is in peril, by reason of such attack upon his property." Penal Code, Art. 570; Pasch. Dig., Art. 2228.

"The party whose person or property is so unlawfully attacked, is not bound to retreat in order to avoid the necessity of killing his assailant." Penal Code, Art. 571; Pasch. Dig., Art. 2229.

"The attack upon the person of an individual, in order to justify homicide, must be such as produces a reasonable expectation or fear of death, or some serious bodily injury." Penal Code, Art. 572; Pasch. Dig., Art. 2230.

"When under Article 570 a homicide is committed in the protection of property, it must be done under the following circumstances :

1. The possession must be of corporeal property, and not of a mere right; and the possession must be actual, and not merely constructive. 2. The possession must be legal, though the right of property may not be in the possessor. 3. If the possession be once lost it is not lawful to regain it by such means as result in homicide. 4. Every other effort in his power must be made by the possessor, to repel the aggression, before he will be justified in killing." Penal Code, Art. 573; Pasch. Dig., Art. 2231.

"Simple assault and battery or mere trespass upon property, will not justify homicide, nor will any offence, not accompanied by force, such as theft, except in the night time, and from some house or place, such as defined in Articles 680 and 681." Penal Code, Art. 574; Pasch. Dig., Art. 2232.

This statute does not appear to have been as yet directly expounded in any Texas case. Should a case arise not embraced in its provisions—such, for instance, as killing an innocent person in order to save one's own life,—doubtless the rule would hold which Sir Michael Foster and Mr. East laid down with reference to the 24 Hen. 8, ch. 5, which rule is also contained in the statutes of some of the American States, namely: "But though the statute only mentions certain cases, it must not be taken to imply an exclusion of any other instances of justifiable homicide, which stand on the same footing of reason and justice." Foster, 276; 1 East P. C. 272.

COMMONWEALTH v. DRUM.

[8 SMITH, 1.]

In the Court of Oyer and Terminer for Westmoreland County, Pennsylvania, November Term, 1868.

Before Hon. DANIEL AGNEW,

One of the Judges of the Supreme Court, sitting by assignment.

MUTUAL COMBAT—DUTY OF RETREATING BEFORE KILLING—KILLING WITH DEADLY WRAPON—DEGREES OF HOMICIDE—REASONABLE DOUBT, ETC.

1. To excuse homicide by a plea of self-defence, it must appear that the

slayer had no other possible, or at least probable, means of escaping, and that his act was one of necessity. [Acc. Shippey's case, *ante*, and citations.]

2. If the slayer use a deadly weapon and under such circumstances as he must be aware that death will be likely to ensue, the necessity, to excuse the homicide, must be great and must arise from imminent peril to life or of great bodily injury.

3. If the object of the assailant appears to be to commit only an ordinary assault and battery, it will not excuse a man of equal or nearly equal strength in taking his assailant's life with a deadly weapon. The act of the slayer must not be entirely disproportioned to the attack upon him. [Acc. John Kennedy's case, *ante*, p. 106; Thompson's case, *ante*, p. 92; Benham's case, *ante*, p. 115; Scott's case, *ante*; Stewart's case, *post*.]

4. Ordinarily a man may stand in all proper places, and need not flee from every one who chooses to assail him. But the law does not apply this right to homicide. The question here does not involve the right of mere ordinary defence, or the right to stand wherever he may rightfully be, but it concerns the right of one man to take the life of another. When it comes to the question whether one man shall flee or another shall live, the law decides that the former shall rather flee than that the latter shall die. [See note to Selfridge's case, *ante*, page 28; note to James D. Kennedy's case, *ante*, p. 139.]

5. The burden is upon the slayer to prove that there was an actual necessity for taking life, or a seeming one, so reasonably apparent and convincing to him, as to lead him believe he could defend himself only in that way.

6. The reasonable doubt to the benefit of which the accused is entitled, must fairly arise out of the evidence, not be merely fancied or conjured up; such a difficulty as fairly strikes a conscientious mind and clouds the judgment.

7. Under the plea of self-defence, if the evidence leaves the prisoner's extenuation in doubt, he can not be acquitted of all crime, but must be convicted of homicide in some of its grades. [See PART IV of this volume.]

8. Murder in the first and second degree, manslaughter, and excusable homicide defined, distinguished and applied in this case: also reasonable doubt to acquit, and that arising under plea of self-defence.

AGNEW, J., charging the jury:

* * * * *

On the part of the Commonwealth, it is alleged that in consequence of previous difficulties between the prisoner and the deceased, the prisoner armed himself with a dirk knife or dagger, intending to use it upon deceased, if they met and had another difficulty; that when they met on Thursday night, after deceased was struck at over the railing by Robert Miskelly, he turned downwards and toward the curb, and was striking at some one there, and not at the prisoner, and while thus engaged, the prisoner,

stepping or leaning forwards towards him, extended his arm and gave him the thrust in the left side, which was next to him. In this view of the case, the preparation of the knife, the entire absence of provocation at the time of giving the wound, the deadly nature of the weapon, and the vital part at which the blow was aimed, all tend to prove that the killing was wilful; that there was time to deliberate; that the blow was premeditated; that there was no legal ground of provocation, and no impetuous rage or passion. If you believe this is the true version of the case, then you are asked by the Commonwealth to convict the prisoner of murder in the first degree, on the ground that he killed the deceased wilfully, deliberately and premeditatedly, and with malice aforethought. If you should find this to be so, it would constitute in law murder of the first degree.

But the version of the defence is that the knife was not prepared; that it was one which the prisoner carried and used in his hunting excursions, and that he was preparing to go out upon such an excursion; that the deceased, a large, muscular and fighting young fellow, was, in consequence of the former altercation, seeking the prisoner to whip him, of which the prisoner was informed; that, discovering him in the saloon, he came there to do so, and waited near by until he came out, and then returning and finding him standing beside the railing, he attacked him, struck him two blows, was diverted a moment by Riley Miskelly taking hold of him; then after casting off Riley, and dodging the blow of Robert Miskelly, returned to his assault upon the prisoner, and struck him in the face; that the prisoner, then taking out his knife, and before the blow could be repeated by the deceased, cut him in the side, making the wound which caused death, and at the time of doing this, he was so hemmed in he could not escape. If these be the facts—the true version of the case, then the defence ask you to say that the wounding was only in self-defence, demanding a verdict of entire acquittal, and if not in self-defence, that at the very most it is but manslaughter.

To excuse homicide by the plea of self-defence, it must appear that the slayer had no other possible, or at least, probable, means of escaping, and that his act was one of necessity. The act of the slayer must be such as is necessary to protect the person from death or great bodily harm; and must not be entirely disproportioned to the assault made upon him. If the slayer use a deadly weapon, and under such circumstances as the slayer must be aware that death will be likely to ensue, the necessity must be great, and must arise from imminent peril of life, or great bodily injury. If there be nothing in the circumstances indicating to the slayer at the time of his act that his assailant is about to take his life, or do him great bodily harm, but his object appears to be only to commit an ordinary assault and battery, it will not excuse a man of equal, or nearly equal strength, in taking his assailant's life with a deadly weapon. In such a case it requires a great disparity of size and strength on part of the slayer, and a very violent assault on part of his assailant, to excuse it. The disparity on the one hand, and the violence on the other, must be such as to convince the jury that great bodily harm, if not death, might have been suffered, unless the slayer had thus defended himself, or that the slayer had a reasonable ground to think it would be so.* The burthen lies on the prisoner, in such a case, of proving that there was an actual necessity for taking life, or a seeming one so reasonably apparent and convincing to the slayer, as to lead him to believe he could only defend himself in that way. The jury will remember I am speaking of wilful killing with a deadly weapon. If this intent to kill existed in the mind of the prisoner at the time of giving the blow, two difficulties arise in the case upon the plea of self-defence, which the jury must pass upon and decide. The attack of Mohigan was made with his fists; no weapon appears to have been used by him; the blows appear to have

* See, upon the question of disparity of size and strength between combatants, Selfridge's case, *ante*, p. 23; Thompson's case, *ante*, p. 92; Benham's case, *ante*, p. 115; Riley and Stewart's case, *ante*, p. 155.

taken no great effect, and at the time Mohigan was alone, while two persons, not unfriendly to the prisoner, were interfering in his behalf. Under these circumstances (if you so believe them), was there any real or apparent necessity to take life for the purpose of defence? Did Mohigan do, or try to do, more than beat the prisoner with his fists? Was the disparity of size and strength of the prisoner so great as to require him to take Mohigan's life to prevent great bodily harm to himself, in such a case, where no weapon was used against him? The other difficulty arising upon the plea of self-defence is, whether the prisoner had not an opportunity of escaping down into the saloon, or down street, when Riley Miskelly and Robert Miskelly interfered in his behalf. Taking their testimony, was there anything to prevent his escape when Mohigan was diverted in his attack from him? If you believe Cline, a witness for defence, that Drum had advanced out into the pavement before the entrance to the saloon, and was no longer hemmed in by the railing; and that Mohigan, after leaving Riley and Robert Miskelly, advanced down the pavement, (and the striking downward is corroborated, to some extent, by Stewart), was there anything to prevent Drum's escape? If you think he could readily have escaped without striking the fatal blow; if you think he was not prevented from escaping by the fierceness of the attack, it is not a case of self-defence. The law is too careful of life to permit it to be taken without an excusable necessity.

The next enquiry, and it seems to me the all-important one, is whether the act of the prisoner was manslaughter only. If the prisoner did not meditate the death of Mohigan; if he did not prepare the knife to take his life; and if upon the sudden impulse, arising from the blow he received, and the passion they produced, he drew out his knife in a rage, and gave the fatal blow, it would be manslaughter. Or, if from the suddenness of the attack and an uncontrollable fear seizing him, but without such an excusable necessity as I have described, he drew out the

knife and struck the blow without malice, he would be guilty of manslaughter only. Upon this branch of the case I must instruct you that the previous occurrences on Monday night and Thursday night furnish no justification or even excuse to Mohigan, in making the attack upon the prisoner on Thursday night at the saloon. This attack constituted a sufficient ground on the part of the prisoner to defend himself in a proper manner. But this defence, as I have before said, must not exceed the reasonable bounds of the necessity. Here the jury must attend to this important distinction. The argument of the defence is, that when the slayer is not in fault, is not fighting at the time, or has given up the fight, and then slays his adversary, he is excusable as in self-defence. But though this may be the case, it is not always so. The true criterion of self-defence, in such a case, is, whether there existed such a necessity for killing the adversary, as required the slayer to do it in defence of his life or in the preservation of his person from great bodily harm. If a man approaches another with an evident intention of fighting him with his fists only, and where, under the circumstances, nothing would be likely to eventuate from the attack but an ordinary beating, the law cannot recognize the necessity of taking life with a deadly weapon. In such a case it would be manslaughter; and if the deadly weapon was evidently used with a murderous and bad-hearted intent, it would even be murder. But a blow or blows are just cause of provocation, and if the circumstances indicated to the slayer a plain necessity of protecting himself from great bodily injury, he is excusable if he slays his assailant in an honest purpose of saving himself from this great harm. The right to stand in self-defence, without fleeing, has been strongly asserted by the defence. It is certainly true, that every citizen may rightfully traverse the street, or may stand in all proper places, and need not flee from every one who chooses to assail him. Without this freedom our liberties would be worthless. But the law

does not apply this right to homicide. The question here does not involve the right of merely ordinary defence, or the right to stand wherever he may rightfully be, but it concerns the right of one man to take the life of another. Ordinary defence and the killing of another evidently stand upon a different footing. When it comes to a question whether one man shall flee or another shall live, the law decides that the former shall rather flee than that the latter shall die.*

But if the prisoner had prepared the knife and intended to use it for the purpose of killing Mohigan, and merely waited for an assault by him for an occasion to use it, and in consequence of this premeditated design, did use it, it would be murder, and if the act was at the time done with coolness and deliberation, it would be murder in the first degree. If, however, he had no specific intention of taking life, intended not to kill, but only to maim and wound, it would be only murder in the second degree. It is the province of the jury to decide upon the credibility of the witnesses, the kind of offence, and, if it is a murder, to ascertain whether it be of the first or second degree. In deciding upon the case, or upon any material part of it, it is the duty of the jury to give the prisoner the benefit of any reasonable doubt arising out of the evidence which prevents them from coming to a satisfactory conclusion. But this doubt must fairly arise out of the evidence, and not be merely fancied or conjured up. A jury must not raise a mere fanciful or ingenious doubt to escape the consequences of an unpleasant verdict. It must be an honest doubt—such a difficulty as fairly strikes a conscientious mind and clouds the judgment. If the mind be fairly satisfied of a fact, on the evidence—as much so as would induce

* *Quære* whether this statement is applicable to any other case than mutual combats or non-felonious assaults. It does not apply to felonious attempts, for in such cases the assailed may pursue. Foster, 273; 1 East P. C., 271; Mawgridge's case, Kelyng, 128, 129. PARSONS, Ch. J., in Selfridge's case, *ante*, p. 1; Carroll's case, *post*; Collins' case, *post*; note to Selfridge's case, *ante*, p. 28; note to James D. Kennedy's case, *ante*, p. 139; note to Stoffer's case, *post*.

a man of reasonable firmness and judgment to take the fact as true, and to act upon it in a matter of importance to himself, it would be sufficient to rest a verdict upon it. As to whether a reasonable doubt shall establish the existence of a plea of self-defence, I take the law to be this: If there be a reasonable doubt that any offence has been committed by the prisoner, it operates to acquit. But if the evidence clearly establishes the killing by the prisoner purposely, with a deadly weapon, an illegal homicide of some kind is established, and the burthen then falls upon the prisoner, and not on the Commonwealth, to show that it was excusable as an act of self-defence. If, then, his evidence leaves his extenuation in doubt, he cannot be acquitted of all crime, but must be convicted of homicide in some of its grades—of manslaughter, at least.

Starting, then, with the legal presumption of innocence in favor of the prisoner, until the proof fairly establishes his guilt, the first question to be decided is, whether he is guilty of murder? If he formed the design to kill Mohigan—if, in consequence of this purpose, he prepared or procured a deadly weapon, and carried it about with him to be used when occasion offered itself; and, if, when the opportunity arose, he did use it, it would be murder. If at the time he did the act, he thought of his purpose to kill him, and had time to think that he would execute it, and formed fully in his mind the conscious design of killing, and had time to think of the weapon he had prepared, and that he would use it, and accordingly so did use it, it would be murder of the first degree. But though he had prepared and carried the weapon, intending to use it, if, at the time the attack was made upon him, he had no real intention of killing Mohigan—did not deliberate upon his act—but in the suddenness of the occasion and impetuosity of his temper, he intended only to cut, wound or do great bodily harm to him, it would be murder of the second degree only.

But if the weapon was not prepared for the occasion; if the prisoner entertained no previous purpose of killing

Mohigan, or of doing him great bodily harm; and if, under the impulse of passion, caused by Mohigan's blows, and arising when they were inflicted, the prisoner struck the fatal blow without malice, he is guilty of manslaughter only; even though on the instant and at the suddenness of the provocation, he intended to kill Mohigan.

Lastly, if not guilty of manslaughter, was the killing only an act of self-defence? On this subject I have already said enough.

You will now take the case and render such a verdict as the evidence warrants; one which will do justice to the Commonwealth and the prisoner.

STEWART v. THE STATE.

[1 OHIO STATE, 66.]

Supreme Court of Ohio, March Term, 1852.

WILLIAM B. CALDWELL, *Chief Justice.*

THOMAS W. BARTLEY,	} <i>Judges.</i>
JOHN A. CORWIN,*	
ALLEN G. THURMAN,	
RUFUS P. RANNEY,	

INSTRUCTIONS ON SELF-DEFENCE—NON-FELONIOUS ASSAULT—KILLING WITH DEADLY WEAPON—DIFFICULTY PRODUCED BY SLAYER—POSSESSION OF WEAPON.

1. A conviction of murder in the second degree will not be reversed because the court below refused instructions on the law of self-defence, which, though true in the abstract, were irrelevant to any hypothesis arising out of the evidence in the case. [Acc. Neeley's case, *ante*, p. 96; Shorter's case, *post*; Harrison's case, *ante*, p. 71; Shippey's case, *ante*, p. 134; Wells' case, *ante*, p. 151; MORGAN, J., in Lamb's case, *post*. But see Logues' case, *post*, and Pridgen's case, *post*.]

* CORWIN, J., having been of counsel for the prisoner on the first trial, did not sit.

2. If a person who is assailed by another with fists only, kill that other with a deadly weapon, it is not excusable self-defence. [Acc. Wiltberger's case, *ante*, p. 34; John Kennedy's case, *ante*, p. 107; Thompson's case, *ante*, p. 92; Adams' case, *post*.]

3. The slayer having sought, and provoked by insulting language, an assault upon himself, in order to have a pretext for killing his adversary, and upon being assaulted by his adversary with fists alone, did stab and kill him, this was not excusable self-defence; but a verdict of murder in the second degree was sustained. [See Neeley's case, *ante*; Adams' case, *post*; Evans' case, *post*; Stoffer's case, *post*, and note to the same. But in Selfridge's case, *ante*, p. 26, it is held that words alone cannot amount to such a procurement of a difficulty as will prejudice his right of defence.]

4. A person assaulted may repel force by force; but it does not follow that he may use a deadly weapon for that purpose; and the fact that his weapon is concealed, places him still further in the wrong.

5. It is not error to charge the jury to take into consideration the manner by which, and the purposes for which, the prisoner had possession of the knife with which he did the killing.

6. It is not error to refuse an instruction on the law of self-defence, not differing in substance from one already given.

This is a writ of error to the Common Pleas of Clark county, reserved by the late Supreme Court for decision in bank.

At the October Term, 1850, of the Common Pleas, the plaintiff in error was indicted for the murder of James R. Dotey. The indictment charged murder in the second degree. At a special term held in November following, he was tried, found guilty as charged, and sentenced. The sentence was reversed by the Court in bank at its December Term, 1850. See 19 Ohio Rep., 202. At the August Term, 1851, of the Common Pleas, he was again tried by a stuck jury, and again convicted of murder in the second degree. Upon this trial sundry bills of exception were taken, which contain certain rulings of the Court, the charge to the jury, and the whole of the evidence. A motion was made for a new trial, which was overruled, and sentence pronounced—to reverse which, this writ is prosecuted.

Anthony & Goode for the plaintiff in error; *William White*, Prosecuting Attorney, and *William A. Rodgers*, for the State.

THURMAN, J., delivered the opinion of the Court:

* * * * *

The fifth error assigned is, that the Court erred and misdirected the jury in the charge delivered to them as to the law of homicide in self-defence, and in refusing certain charges asked by the accused.

The charge complained of was in these words: "The homicide in self-defence, which is considered as excusable, rather than justifiable, is that where a man may protect himself from an assault in the course of a sudden, casual affray, by killing him who assaults him. In such a case, however, the law requires of the party to have quitted the combat before a mortal wound shall have been given, if in his power; to retreat as far as he can with safety, and at last to kill from mere urgent necessity, for the preservation of his life, or to avoid enormous bodily harm. He is supposed to kill his adversary under the impression of an absolute necessity to do so in order to save his own life, or to save himself from enormous bodily harm. If the person killing was not in any supposed or real imminent danger of his own life or enormous bodily harm, and if the jury find that the prisoner could not reasonably have apprehended from the deceased, and did not so apprehend, any danger of his own life, or of enormous bodily harm, then the killing is not excusable homicide."

It is not denied that this charge has a great weight of authority in its support. Indeed, it was more lenient to the accused than the doctrine of many adjudicated cases, in this, that it makes the homicide excusable, if the slayer had reasonable cause to apprehend, and did apprehend, danger to his life, or great bodily harm, although such danger may not, in fact, have existed. And the Court, at the prisoner's request, also charged, that "the law does not measure nicely the degree of force which may be employed by a person attacked, and that if he employ more force than necessary, he is not responsible for it, unless it is so disproportioned to his appa-

rent danger, as to show wantonness, revenge, or a malicious purpose to injure the assailant."

But the part of the charge which seemed to be objected to, was that which relates to the necessity of quitting the combat, if it could be done with safety, before taking the life of the assailant; and it is urged that the law in Ohio is, that a person assailed may, in all cases, without retreating, take his assailant's life, if he reasonably believe it necessary to do so, in order to save his own life, or to avoid great bodily harm; and this, although he could, without increasing his danger, retire, and thereby escape all necessity of slaying his adversary.

As to what is the precise state of the law on this subject, there is some diversity of opinion among the members of this Court, and, therefore, without attempting, at this time, to lay it down, we prefer to dispose of the case upon a view which is satisfactory to us all. And we do this the more willingly, because there is not a full bench sitting upon the case. Whether a person assaulted is, or is not, bound to quit the combat, if he can safely do so, before taking life, it will not be denied that in order to justify the homicide, he must, at least, have reasonably apprehended the loss of his own life, or great bodily harm, to prevent which, and under a real, or, at least, supposed necessity, the fatal blow must be given. And again, the combat must not have been of his own seeking, and he must not have put himself in the way of being assaulted, in order that when assailed and hard pressed, he might take the life of his assailant. It will also be admitted, that in a criminal, as well as a civil cause, before the judgment can be reversed for error in the charge to the jury, it must appear that some evidence was given tending to prove a state of case in which the charge would be material. If the charge was upon a mere abstract question of law, that could not arise upon the testimony, and could not influence the decision of the jury, its character, however erroneous, furnishes no ground to reverse the sentence. And such, we are clearly of opinion, was the case under considera-

tion. We find no evidence tending to prove that Stewart, when he saw Dotey, was in danger of loss of life or limb, or of great bodily harm, or that he apprehended such danger. Were there any evidence, however slight, tending to show that he reasonably believed such danger to exist, we would feel bound to decide upon the correctness of the charge complained of; but we see no such testimony. And we are equally satisfied that the combat did not occur without blame on his part. On Sunday, the day previous to the murder, he showed George Huff the knife with which he afterwards killed Dotey. It was a very deadly weapon, the blade of which opened with a spring. He opened it, and prepared it for use by greasing it, and said that if he had had it the night before, when he was attacked, he did not think that Dotey would have got out of the bar-room safe; and that if Dotey ever attacked him again—he or any of the crowd that was with him—he would cut his d——d guts out. On the same day he made similar declarations to the witness Beall, and showed him the knife, and told him he intended to carry it, and ask Dotey for the money whenever he saw him again, and if he attempted to whip him, he would cut his d——d guts out; that he would dun him every time he met him. He made similar statements to Pierson Spinning, Monday morning. The affray took place just after supper Monday evening.

John Huff testifies, that before supper that evening, "I was sitting on the bench by the bar-room door, and Stewart said to me, 'John, there will be war here to-night.' I thought he referred to the military that were encamping in town, and replied, that I reckoned not. Stewart replied, 'Yes, he guessed there would be war'; that McCartney and Dotey were coming down there to whip him, if he asked them for the money they owed him, and he said he intended to ask them for it." Shortly after supper, Stewart came out of the hotel, his boarding-house, and saw Dotey and McCartney standing on the pavement. Dotey was leaning against a post.

Stewart came forward to near where he was standing, and said, "John and Jim, I want to know if you are going to pay me the money you owe me?" Dotey told him to go away about his business; he did not want anything to do with him, or to say to him. Stewart replied, that he had paid for Dotey's dinner, and he ought to be man enough to pay for that. Dotey said he had meant to pay, but Stewart had acted so meanly in dunning him in the street at every opportunity, that he did not intend to pay. Stewart said he had asked him for it in private. Dotey denied it. Stewart reaffirmed his statement, and Dotey replied, "It's a lie." Stewart rejoined, "It's a damned lie," or, "You are a damned liar." Dotey said, "I won't take that," and advanced toward Stewart with his hand raised to strike him, and struck at him. Stewart did not move; and as soon as Dotey came within reach, he stabbed him, and, repeating his blows, gave him five stabs, one in the abdomen, which severed the intestines, one in the back, two through the left arm, and one between the shoulder-blade and ribs. Dotey cried out, "Take him away; he has a knife." They were then separated by some of the bystanders, and Dotey afterwards died of the wounds. Stewart received no injury, except a cut in his hand, made by his own knife, no doubt. When Dotey started toward Stewart, they were but a few feet apart, and the conflict lasted but a few seconds. It does not appear that Dotey had any weapon. He certainly attempted to use none. Stewart neither showed his knife, nor said he had one, before using it. He appears to have concealed it from Dotey until he gave the fatal stabs.

Now it does seem clear to us, that Stewart sought to bring on the affray; that he desired to be assaulted, and intended if assaulted, to make good his previous threats of using his knife. True, he had a right to dun Dotey for his money, but he had no right to do so for the purpose of bringing on an affray, in order to afford him a pretext to stab his enemy.

There is some testimony tending to prove that Dotey

went to the hotel that night to whip Stewart. It is not impossible that such was the fact; but if so, and the combat was mutual, the case is no better for the accused. Again, it does not appear that Stewart was, at any time, in danger of a serious injury, or that he apprehended it. There is no testimony tending to prove either the danger or the belief of it.

We have next to consider the refusal to charge as requested by the accused. He asked the Court to direct the jury, "That if a man is attacked by a person of strength superior to his own, he is not bound to flee, but may use such force and such weapons as may be sufficient to resist the force employed against him, and if the assailant is killed, it is neither murder in the first or second degree, nor manslaughter." Which instruction the Court refused to give. As to so much of this instruction as relates to the necessity of retreating, it was immaterial, for the reasons we have given. As to the residue of the instruction, if it had any application to the case, it amounted in substance to this: that Stewart, when assailed by an unarmed man, might repel the assault by the use of a deadly and concealed weapon, even though it might have been as well resisted by other means. The Court were not asked to tell the jury that a man, in his defence, may employ sufficient force to repel the assailant. That they had already charged. But they were asked in effect to say, that he may employ any weapon sufficient for that purpose. If this is so, a man on whom an ordinary assault and battery is committed, may pierce his assailant with a sword, or knock him down with an axe; for each of these is a weapon "sufficient to resist the force employed." We do not think such is the law.

The Court were also asked to instruct the jury, "That if the killing arose from previous malice on the part of the defendant, and not from what occurred on the evening of the 9th of September, 1850, he cannot be convicted as indicted;" which charge was given with the following modification: strike out "previous," and insert

“deliberate and premeditated,” in the place thereof. The charge as asked, if we understand it, was, in effect, that if the jury found the crime was murder in the first degree, the prisoner could not be convicted under the indictment, which only charged murder in the second degree; and the amendment of the Court only made the proposition clearer. If there was error in this point, it was in giving the charge at all. But the accused cannot complain of this, as it was in his favor.*

The accused also asked the Court to charge the jury, that “in this State, any man has a constitutional right to carry weapons for self-defence, and hence, there is no presumption of malice from the carrying of a weapon, such as the knife with which James R. Dotey was killed.” Which charge was given, with the following modification: “That the jury may and ought to take into consideration the manner by which, and purposes for which, the prisoner had the possession of the knife in question.” This modification was excepted to, but we see no error in it.

The following charge was also asked by the accused: “That if the defendant had reasonable ground to apprehend danger to his life, or great bodily harm, he would have the same right to defend himself, whether there was actual danger or not.” Which charge was declined, on the ground that the Court had already charged on the same point.

It was true that the Court had so charged, and substantially as prayed in the above instruction. We suppose it was not erroneous to refuse to repeat the charge.

The next assignment of error is, that “The verdict of the jury is without evidence, and contrary to the evidence in the case.” If we can consider this assign-

* See Selfridge's case, *ante*, p. 20, where PARKER, J., said to the jury: “Whether the killing were *malicious* or not, is no further a subject of enquiry than that if you have evidence of malice, it may be considered as proving this crime, [manslaughter,] because it effectually disproves the only defence which can be set up after a killing is established.”

ment at all, it is sufficient to say that the verdict is not without evidence, nor contrary to the evidence—certainly not grossly so.

It is next assigned for error, that “the verdict of the jury is against law.” We do not think so.

The last assignment is, that “the Court erred in overruling the motion for a new trial.” The grounds upon which a new trial was asked, were the same we have above considered. In our opinion, the motion was properly overruled.

The judgment of the Common Pleas is affirmed, with costs.

Judgment affirmed.

THE STATE v. HILL.

[4 DEV. & BATT., 491.]

Supreme Court of North Carolina, December Term, 1839.

THOMAS RUFFIN, *Chief Justice.*

JOSEPH J. DANIEL, } *Judges.*
WILLIAM GASTON, }

ASSAULT WITH MALICE—OLD GRUDGE—DEFENCE IN COMBAT—RETREATING TO THE WALL.

1. Where one assails another, and a combat ensues, and in such combat the assailant kills the assailed, if the first assault was made with a preconceived design to kill or inflict great bodily harm, then, the malice of the first assault, notwithstanding the violence with which it is returned, communicates itself to the last act of the prisoner, and the killing is murder.

2. If one assault another with malice prepense, and is driven to the wall, and then kill his adversary to save his own life, he is guilty of murder in respect of the first intent. [Contra, Stoffer's case, *post.*]

3. Where two persons have formerly fought on malice, and are apparently reconciled, and fight again on a fresh quarrel, it shall not be intended that they were moved by the old grudge, unless it so appear from the circumstances of the affair. [Acc. Copeland's case, *ante*, p. 41.; Williams' case, *post.*]

4. Where a man makes an assault, which is returned with a violence manifestly disproportionate to that of the assault, the character of the

combat is essentially changed, and the assaulted becomes in turn the assailant; and if the person who made the first assault, in the transport of passion thus excited, and without previous malice, kill his adversary, the proper enquiry as to the degree of his guilt, is not whether he was possessed of deliberation and reflection, so as to be sensible of what he was then about to do, and intentionally did the act; but whether a sufficient time had elapsed after the violent assault upon him, and before he gave the mortal wound, for passion to subside and reason to resume her sway; for if there had not, he would be guilty of manslaughter only.

5. If one began an affray, or even if he did not begin it, but was assaulted in the first instance, and then a combat ensued, he could not excuse himself as for a killing in self-defence, unless he quitted the combat before the mortal blow was given, if the fierceness of his adversary permitted, and retreated as far as he might with safety, and then he killed his adversary of necessity, to save his own life.

Indictment for murder. On the trial, several witnesses were examined, who testified substantially as follows:

The deceased and the prisoner had for the last twelve months been upon bad terms; had had several disputes, and, on one occasion, a rencounter, in which both parties drew their knives; the prisoner, during the last summer, had said that unless the deceased should quit troubling him, he would take his life. On the week before the fair, the prisoner had procured a knife twelve inches in length, and said he expected yet to kill some person with it. On Saturday, the 28th of September, the prisoner went to the house of one Edwards, much intoxicated, and slept for some hours. On the same day, the deceased went to the same place, also intoxicated. Something was said about shooting, and the deceased applied to the prisoner, as well as to others to borrow money, which the prisoner refused. They were in a room by themselves, when the deceased passed through another room, the prisoner following, and both having their knives drawn; which, however, they put up, not evincing as the witness thought, any disposition to use them. Both parties, shortly after this, went out at the side-door of the house, the deceased first, and the prisoner following after. Shortly afterwards the deceased was seen going into the house at the end-door, when the prisoner caught hold of his waistcoat, and pulled him back, and said, "Let us talk it over;" to which the

deceased made no reply that could be heard. The prisoner then struck him, upon which the deceased pulled out his knife, as one of the witnesses thought, and gave three cuts, one lightly across the prisoner's arm, and the other pretty severely in the abdomen, the prisoner giving back and pushing the deceased from him. The prisoner then jumped off, pulled out his knife and opened it, exclaiming, "Damn him, he has killed me, and I will kill him, if I can." He then advanced five or six steps, and gave a thrust with great force, which proved fatal—the deceased dying the next day. The whole transaction occurred in a few minutes. The witnesses differed as to the position of the deceased at the time he was stabbed; but all of them concurred in saying that he was standing still, and manifesting no inclination to pursue the prisoner or to renew the combat. The deceased was upward of forty years of age, and a turbulent man; the prisoner was about twenty-three years of age, of equal manhood with the deceased; and both were addicted to intoxication.

The cause was submitted to the jury as a case either of excusable homicide, murder, or manslaughter. The jury being unable to agree, asked for further instructions as to the law, when his honor gave the following in writing:

"Excusable homicide.—If the prisoner brought on the affray by making the first attack, he was bound not only to have ceased the combat, but to have used every means in his power, short of taking away the life of the deceased, such as retreating, unless the attack on him was so fierce that retreat would have increased his danger.

"Murder.—A killing with malice, without any just cause or excuse.

"First, If the prisoner *sought the provocation*, by giving the first blow, in order to afford him a pretence for wreaking his vengeance, *or* with the design of using his knife, it is a case of murder.

“Secondly, If the prisoner gave the first blow, and was then cut by the deceased, although he may have been agitated by resentment and anger, yet if the jury collect from what he said and did, when or just before he gave the mortal blow, that, in fact, he was possessed of deliberation and reflection, so as to be sensible of what he was then about to do, and intentionally *did* the act, it was a case of murder.

“*Manslaughter*.—A killing without malice, express or implied, and under the influence of passion or provocation.

“Should the jury think, according to the first proposition, that the prisoner did *not* seek the provocation with any view to revenge; *or*, according to the second, was not possessed of deliberation and reflection at the time he gave the blow, but acted under the influence of passion, excited by the provocation then received, it would be a case of manslaughter.

The jury returned a verdict of guilty, and sentence of death being pronounced upon the prisoner, he appealed.

C. Manly for the prisoner; the *Attorney-General* for the State.

GASTON, J.—From the case which has been stated by the judge who presided at the trial, and which constitutes a part of the record before us, it appears that it was not controverted, but that the prisoner had committed the homicide wherewith he was charged, and that the only question was as to the degree of guilt which the law attached to the fatal deed. Upon this question the jury doubted, and asked for specific instructions; and it was to enable them to come to a correct conclusion upon this question, that the specific instructions set forth in the case were given. It is not for us to determine whether the verdict was warranted by the evidence, but it is our duty to examine whether the law was correctly expounded.

In the investigation of this question, it was necessary

that the jury should, in the first place, ascertain whether the prisoner commenced the affray with a preconceived purpose to kill the deceased, or to do him great bodily harm. For if he did, then there was nothing in the subsequent occurrences of the transaction which could free him from the guilt of murder. If the first assault was made with this purpose, the malice of that assault, notwithstanding the violence with which it was returned by the deceased, communicates its character to the last act of the prisoner. It is laid down as settled law, that if a man assault another with malice prepense, even though he should be driven to the wall, and kill him to save his own life, he is yet guilty of murder in respect of the first intent. 1 Hawkins P. C., Book 1, ch. 11, § 18, and ch. 13, § 26.^a Of that part, therefore, of his Honor's instructions which in the case is called "the first proposition," and which declared, as a conclusion of law, that the prisoner was guilty of murder; if the jury were satisfied from the evidence, that the assault was made by him in order to have a pretence to kill the deceased, or to cut him with the knife, the prisoner has no cause to complain. Such craft, indeed, would but the more strongly indicate the heart fatally bent on mischief.

There was certainly evidence well deserving to be weighed by the jury, in coming to a correct conclusion upon this enquiry. But what was that conclusion, we have not the means of knowing. They might have believed, notwithstanding the testimony as to the antecedent quarrels, and the rencounter between the parties, and in relation to threats of vengeance by the prisoner, that the transaction which they were then examining sprang from the passions of the moment. For certainly, where two persons have formerly fought on malice, and are apparently reconciled, and fight again on a fresh quarrel, it shall not be intended that they were moved by the old grudge, unless it so appear from the circumstances of the affair. 1 Hawkins P. C., B. 1, ch. 13, § 30.^b If, upon consideration of all the evidence, the jury came

^a Curwood's Edition. ^b Curwood's Edition.

to the conclusion that the first assault of the prisoner was not of malice prepense, then the subsequent occurrences demanded their careful consideration; because upon these, the prisoner's guilt might be extenuated into manslaughter, or excused as a homicide in self-defence.

So much of the instructions given upon this view of the case, as relates to excusable homicide, is, in our opinion, not liable to exception. Even if the prisoner had not begun the affray, but had been assaulted in the first instance, and then a combat had ensued, he could not excuse himself as for a killing in self-defence, unless he had quitted the combat before a mortal blow was given, if the fierceness of his adversary permitted, and retreated as far as he might with safety, and had then killed his adversary of necessity, to save his own life. But the remaining part of the instructions, and that part which *may* have had a decisive influence upon the verdict, is, in our judgment, erroneous. According to this, which is laid down as "the second proposition," the jury were instructed "that if the prisoner gave the first blow, and was then cut by the deceased, although he might have been agitated by excitement and anger, yet if they collected from what he said and did, when or just before he gave the mortal blow, that in fact he was possessed of deliberation and reflection, so as to be sensible of what he was then about to do, and did the act intentionally, it was murder. This proposition, as we understand it, and as we must believe it to have been understood by the jury, we are very confident, cannot be sustained.

The proposition supposes that the first assault was made by the prisoner without malice, and that the fatal wound was given while under the influence of indignation and resentment, excited by the excessive violence with which he had been in turn assailed by the deceased; but it refuses to the prisoner the indulgence which the law accords to human infirmity suddenly provoked into passion, if such passion left to him so much of deliberation and reflection, as to enable him to know

that he was about to take, and to intend to take, the life of his adversary. No doubt can be entertained, and it is manifest that none was entertained, by his Honor, but that the excessive violence of the deceased, immediately following upon the first assault, constituted what the law deems a provocation sufficient to excite furious passion in men of ordinary tempers. The case does not state that the first blow given by the prisoner was such as to endanger life, or to threaten great bodily harm, nor that it was immediately followed up by further efforts or attempts to injure the deceased. It must be taken to have been a battery of no very grievous kind, and it justified the deceased in resorting to so much force on his part as was reasonably required for his defence; and in estimating the quantum of force which might be rightfully thus used, the law will not be scrupulously exact. But when an assault is returned with a violence manifestly disproportionate to the assault, the character of the combat is essentially changed, and the assaulted becomes in his turn the assailant. Such, according to the case, was the state of this affray, when the mortal wound was given. To avenge a blow, the deceased attacked the prisoner with a knife—made three cuts at him—and gave him a severe wound in the abdomen. If instantly thereupon, in the transport of passion thus excited, and without previous malice, the prisoner killed the deceased, it would have been a clear case of manslaughter. Not because the law supposes that this passion made him unconscious of what he was about to do, and stripped the act of killing of an intent to commit it, but because it presumed that passion disturbed the sway of reason, and made him regardless of her admonitions. It does not look upon him as temporarily deprived of intellect, and therefore not an accountable agent, but as one in whom the exercise of judgment is impeded by the violence of excitement, and accountable therefore as an *infirm* human being. We nowhere find that the passion which in law rebuts the imputation of malice, must be so overpowering as for the time to

shut out knowledge and destroy volition. All the writers concur in representing this indulgence of the law to be a condescension to the frailty of the human frame, which during the *furor brevis*, renders a man deaf to the voice of reason, so that, *although the act done was intentional of death*, it was not the result of malignity of heart, but imputable to human infirmity.

The proper enquiry to have submitted to the jury on this part of the case was, whether a sufficient time had elapsed after the prisoner was stabbed, and before he gave the mortal wound, for passion to subside and reason to reassume her dominion; for it is only during the temporary dethronement of reason by passion, that this allowance is made for man's frailty. And in prosecuting this enquiry, every part of the conduct of the prisoner, as well words as acts tending to show deliberation and coolness on the one side, or continued anger and resentment on the other, was fit to be considered, in order to conduct the jury to a proper result.

The Attorney-General, in his argument, referred to a class of cases, which probably misled the Judge in laying down the proposition before us, in which, circumstances apparently unimportant, but indicative of deliberation, have been thought to establish malice, and repel the idea of human infirmity. The explanation given by the text-writers will show that the doctrine in these cases, although in some respects analagous to that which obtains in a killing upon legal provocation, is not identical with it. The general rule of law is, that words of reproach or contemptuous gestures, or the like offences against decorum, are not a sufficient provocation to free the party killing from the guilt of murder, where he useth a deadly weapon, or manifests an intention to do great bodily harm.

This rule, however, does not obtain where, because of such insufficient provocation, the parties become suddenly heated and engage immediately in mortal combat, fighting upon equal terms. But deliberate duelling, if death ensue, however fairly the combat may be con-

ducted, is, in the eye of the law, murder. The punctilios of false honor, the law regards as furnishing no excuse for homicide. He who deliberately seeketh the blood of another, in compliance with such punctilios, acts in open defiance of the laws of God and of the State, and with that wicked purpose, which is termed malice aforethought. While, therefore, because of presumed heat of blood, the law extenuates into manslaughter a killing upon such sudden rencounter, although proceeding upon an insufficient provocation, it withholds this indulgence when, from the circumstances of the case, it can be collected that, not heated blood, but a settled purpose to vindicate offended honor, even unto slaying, in defiance of law, was the actual motive which urged on to the combat.

In the conclusion of his instructions, the Judge informed the jury "that if they should believe according to the second proposition, that the prisoner was not possessed of deliberation and reflection at the time he gave the mortal blow, but acted under the influence of passion excited by the provocation then received, it would be a case of manslaughter." It is manifest that if there was error in the proposition we have been examining, this general instruction did not correct it; for the jury were expressly referred to that proposition, for the legal meaning of "deliberation and reflection;" and, according to that proposition, there was deliberation and reflection, "if the prisoner was sensible of what he was about to do, and did the act intentionally."

Entertaining a full conviction that in this the jury were misdirected, we are of opinion that the verdict below ought to be set aside, and a *venire de novo* awarded. This decision must be certified to the Superior Court of Wake, with directions to proceed agreeably thereto, and to the laws of the State.

Per Curiam:

Judgment to be reversed.

**C.—KILLING IN SELF DEFENCE, WHERE THE
NECESSITY IS PRODUCED BY THE WRONG-
FUL ACT OF THE SLAYER.**

ADAMS v. THE PEOPLE.

[47 ILL., 376.]

SIDNEY BREESE, *Chief Justice.*

CHARLES B. LAWRENCE, } *Associate Justices.*
PINKNEY H. WALKER, }

HOMICIDE—NECESSITY PRODUCED BY DEFENDANT'S WRONGFUL ACT.

1. Under the Illinois statute, juries in criminal cases are judges of the law, as well as of the fact, and they have the right to pronounce upon the law, as it may seem in their opinion to be. [Acc. Schnier's case, *post*; Fisher v. People, 23 Ill., 283.]

2. While the doctrine is, that a man threatened with danger, must determine from appearances, and the actual state of things surrounding him, as to the necessity of resorting to self-defence, and if he acts from reasonable and honest convictions, he will not be held responsible, criminally, for a mistake as to the extent of the actual danger, where other judicious men would have been alike mistaken; at the same time, he has not the right to provoke a quarrel and take advantage of it, and then justify the killing of the party with whom he has provoked the quarrel.

3. If the defendant sought the difficulty with the deceased for the purpose of killing him, and in the fight did kill him in pursuance of such purpose, it is *murder*. But if the defendant voluntarily got into the difficulty or fight with the deceased, but did not intend to kill at the time, yet did not decline further fighting before the mortal blow was struck, but drew his knife and with it killed the deceased, it is *manslaughter*; although the cutting and killing were done to prevent an assault by the deceased, or to prevent the deceased from getting the advantage in the fight.

4. The defendant cannot avail himself of the plea of necessary self-defence, if the necessity for that defence was brought on by his own deliberate and lawless acts, as by his bantering the deceased to a fight for the purpose of taking his life or committing bodily harm upon him,—if in the affray he killed the deceased with a deadly weapon. [Acc. Selfridge's case, *ante*, p. 24; Neeley's case, *ante*, p. 96; Stonecifer's case, 6 Cal., 407; Benham's case, *ante*, p. 115; Rippy's case, *post*; Stewart's case, *post*; Evans' case,

post. Otherwise, if he in good faith decline the combat and retreat as far as he can. *Stoffer's case, post.* *See note at end of *Stoffer's case, post.*]

5. Where a party on trial on the charge of murder, defends upon the ground that he acted in self-defence, evidence that the deceased had a bowie knife inside of his coat only a short time before the killing, and that he declared he would cut the accused's heart out with it, was not improperly rejected, it not being shown that the prisoner knew the fact, or acted upon the suspicion of its existence, and it appearing that the deceased had no evil design towards the accused, but rather the latter sought the difficulty in which the killing occurred.

Writ of Error to the Circuit Court of Crawford County; the Hon. H. B. DECIUS, Judge, presiding.

The facts appear in the opinion.

J. C. Allen and *E. Callahan*, for the plaintiff in error; *Robert G. Ingersoll*, Attorney-General, for the people.

BREESE, Ch. J., delivered the opinion of the Court:

This was an indictment, in the Crawford Circuit Court, of William Adams, for the murder of Thomas Bostic. The jury found the prisoner guilty of manslaughter, and fixed the term of his imprisonment in the penitentiary, at ten years.

A motion for a new trial was made by the prisoner, based on his own affidavit, and that of two other persons, alleging misconduct of the jury, and on the further ground of newly discovered evidence. The Court denied the motion, and rendered judgment on the verdict, and the cause is brought here by writ of error. The points made here by the prisoner's counsel are, the modification, by the Court, of prisoner's third instruction, and giving the twelfth and twentieth instructions on behalf of the people, and in refusing to give the prisoner's thirteenth and last instruction. As to his last instruction it was properly refused, as it had nothing to do with the case; it was wholly irrelevant, and the jury were not in a position to know what the decisions of the Supreme Court had been on questions of law. Whether final or not, was no concern of the jury in the particular case they were trying, nor were these decisions, multitudinous as they are, before the jury by the testimony, as it appears on the record. Under our statute, juries in crim-

inal cases are the judges of the law as well as of the fact, and they have a right to pronounce on the law as it may seem in their opinion to be, as this Court decided in *Schnier v. the People*,^a 13 Ill., 17, and *Fisher v. the People*, 23 Ill., 283.

The third instruction of defendant, as asked, was as follows: "If the jury believe, from the evidence, that at the time Adams struck the blow or blows, that resulted in the death of Bostic, he, Adams, had reasonable ground to believe that the killing of Bostic was necessary to save his own life, or to protect himself from great bodily harm, then the killing was justifiable, and the jury should find the defendant not guilty." The Court qualified this instruction, and it is alleged as error, by adding as follows: "Unless the jury further believe that the difficulty was commenced by the defendant for the purpose of taking the life of Bostic, or inflicting upon him a great bodily harm."

The objection to this qualification is made upon the assertion by the accused, that there was no evidence that he made an assault or commenced a difficulty with the deceased for the purpose of taking his life or doing him bodily harm, or for any other purpose. Colliflower, the principal witness for the prosecution, stated in his testimony that he saw the whole transaction, and from his testimony the jury might well infer the accused sought the difficulty with the deceased. While the doctrine is, as established by this Court, in *Schnier v. the People*, *supra*; *Maher v. the People*^b 24 Ill., 242, and *Campbell v. the People*^c, 16 Ill., 17, that a man threatened with danger must determine from appearances and the actual state of things surrounding him, as to the necessity of resorting to self-defence, and if he acts from reasonable and honest convictions, he will not be held responsible, criminally, for a mistake as to the extent of the actual danger, where other judicious men would have been alike mistaken; at the same time he had not the right to provoke the quarrel and take advantage of it, and then justify

^aPost. ^bPost. ^cPost.

the homicide. This was the extent and purport of the qualification, and was entirely proper. For these reasons, the twelfth instruction for the people was right. It was as follows: "If the defendant sought a difficulty with the deceased for the purpose of killing him, and in the fight did kill him, in pursuance of his malicious intention of taking the life of Bostic, they will find him guilty of murder, but if they find that defendant voluntarily got into the difficulty or fight with Bostic, but did not intend to kill at the time, and did not decline further fighting before the mortal blow was struck by him, and then drew his knife and with it struck and killed Bostic, they will find the defendant guilty of manslaughter, although the cutting and killing were done in order to prevent an assault upon him by Bostic, or to prevent Bostic from getting the advantage in the fight." And the twentieth instruction was also proper. It was as follows: "The defendant cannot avail himself of necessary self-defence, if the necessity of that defence was brought on by the deliberate and lawless acts of the defendant, or his bantering Bostic to a fight for the purpose of taking his life, or committing a bodily harm upon him, and in which he killed Bostic by the use of a deadly weapon.

Upon the point of newly discovered evidence, as a ground for a new trial, the doctrine has been settled in this Court, that a verdict will not be set aside merely to afford the defendant an opportunity of introducing newly discovered testimony which is not conclusive in its character, or is merely cumulative. *Smith v. Shultz*, 1 Scam., 490; *Morrison v. Stewart*, 24 Ill., 25. And the rule is the same in criminal cases.

We see nothing conclusive of any fact in any portion of the newly discovered testimony. It is merely cumulative. Threats of a similar kind were spoken of by several witnesses, and the accused had the full benefit of them. The dying declarations of Bostic, that he did not wish the accused hurt for what he had done, and that accused had done nearly right, etc., affords no evidence of anything more than a truly Christian spirit on the

part of one who had been unjustly done to death, and who, in his dying agonies, was willing to forgive the malefactor. The further statement that he knocked down the accused, three times before the accused touched him, was substantially before the jury on the trial. The proof is clear, that when deceased, the woman and Suthard approached the wagon in which was the accused, he jumped out and went toward the deceased, for what purpose was to be inferred by the sequel. The deceased knocked him down twice before the accused actually touched him, but he was advancing upon the deceased in a menacing manner, with his knife, in all probability, ready, but concealed for the expected emergency. The deceased did not follow up the advantages he had gained, but seemed desirous of avoiding a collision.

The testimony of Samuel Jacobs, that deceased had a bowie-knife inside of his coat only a short time before the killing, and his declaration, that he would cut the accused's heart out with it, could have had no weight with the jury, if it had been before them, for it is not shown the prisoner knew the fact, or acted upon the suspicion of its existence. The evidence goes to show, most clearly, that the deceased had no evil designs toward the accused, for if he had, a most favorable opportunity existed for him to carry them out after he had knocked the accused down, and had him completely in his power.

The testimony, we think, fully sustains the finding of the jury, and it could not have been different had all the evidence, alleged to be newly discovered, been before them.

* * * * *

We cannot perceive that any rule of law has been violated by the Circuit Court to the prejudice of the prisoner. He has had a fair trial by a jury of his neighbors, and though we might not have found on the facts as they did, we cannot say their finding is so against the evidence as to justify interference by this Court.

The judgment must be affirmed.

Judgment affirmed.

STOFFER v. THE STATE.

[15 OHIO STATE, 47.]

*Supreme Court of Ohio, December Term, 1864.*JACOB BRINKERHOFF, *Chief Justice.*

JOSIAH SCOTT,	} <i>Judges.</i>
RUFUS P. RANNEY,	
HORACE WILDER,	
WILLIAM WHITE,	

FELONIOUS ASSAULT—ASSAILANT RETREATS TO THE WALL, AND THEN KILLS IN SELF-DEFENCE.

1. While the party who first commences a malicious assault continues in the combat, and does not put into exercise the duty of withdrawing from the place, although he may be so fiercely pressed that he cannot retreat, or is thrown upon the ground, or *driven* to the wall, he cannot justify taking the life of his adversary, however necessary it may be to save his own; and must be deemed to have brought upon himself the necessity of killing his fellow-man.

2. But when he has succeeded in wholly withdrawing from the conflict, and in good faith, has retreated to a place of apparent security, his right of self-defence is fully restored, and if pursued by his antagonist, and there attacked in a manner to endanger his life, he is justified in taking the life of his antagonist, if it becomes inevitable to save his own. [Contra, Hill's case, *ante*.]

3. But the conduct of the accused relied on to sustain such a defence, must have been so marked in the matter of time, place and circumstance, as not only clearly to evince the withdrawal of the accused in good faith from the combat, but such also as fairly to advise his adversary that his danger had passed, and to make his conduct thereafter the pursuit of vengeance, rather than measures taken to repel the original assault.

4. Where the defendant made a murderous assault upon the deceased in the street with a knife, but afterwards desisted from the conflict, declined further combat, and retreated rapidly a distance of one hundred and fifty feet, and took refuge in the house of a stranger, where he shut and held the door; but the deceased, his brother and another immediately pursued, throwing stones at the defendant, and crying "kill him," as he retreated; and forcibly opened the door, entered the house, and assaulted the defendant therein, and in the conflict which immediately ensued, the deceased was killed by the defendant: *it was held*, that while the defendant was amenable to punishment for the murderous assault with which he commenced the affray, yet he had done all that the law required

of him, in withdrawing from the combat and retreating to the wall before killing his adversary ; and that it was hence error to give instructions and refuse others, which presented the law differently from what it is above declared to be.

The case is stated in the opinion of the Court.

D. W. Stambaugh and *J. C. Hance* for plaintiff in error ; *L. R. Critchfield*, Attorney-General, for the State ; *A. L. Neely* and *A. W. Patrick*, also for the State.

RANNEY, J., delivered the opinion of the Court :

The plaintiff in error was indicted in the Court of Common Pleas of Tuscarawas county for the murder of Montgomery Webb, and, upon the trial, was found guilty of manslaughter, and sentenced to the penitentiary for six years.

The refusal of the Court to give certain instructions to the jury, as prayed for by him, as well as the instructions given, are assigned for error, and for that cause alone he seeks a reversal of the judgment.

Upon the argument, two questions of very considerable nicety and practical importance, have been presented, which we shall proceed to dispose of in the order in which they appear in the record.

1. From the bill of exceptions it appears that, after the State had given evidence tending to prove that the plaintiff made an assault upon Webb in the street, with the intent to murder him with a knife, and that in the conflict which ensued, Webb was killed by him, the plaintiff in error gave evidence tending to prove that he desisted from the conflict, declined further combat, and retreated rapidly a distance of one hundred and fifty feet, and took refuge in the house of a stranger, where he shut and held the door ; that Webb, his brother, and one Dingman immediately pursued, throwing stones at him, and crying, " Kill him ! " as he retreated, and forcibly opening the door, they entered the house and assaulted him, and in the conflict which immediately ensued, Webb was killed.

Upon this state of the evidence, counsel for the plaintiff in error requested the Court to instruct the jury, that

the killing of Webb would be excusable, although the accused should have made the assault upon him with the malicious intent of killing him, if the jury should find that, before Webb had received any injury, the accused desisted from the conflict, and, in good faith, declined further combat, and retreated to a place which he might reasonably regard as a place of security, and that Webb and those in concert with him, immediately pursued and forcibly entered such place, and there made an assault upon the accused, in such manner as to warrant him in believing that his life was in danger at the hands of Webb, and without deliberation or malice, and to save his own life, he took that of Webb.

This instruction the Court refused to give, but in substance, charged the jury that, under such circumstances, the accused would be guilty of manslaughter, provided they “should regard the *conduct* of *Webb*, from the commencement of the conflict in the street to the time of the conflict in the house, as continuous.”

The difference between the instruction asked and that given, is easily appreciated. The one makes the *conduct of the accused* in declining, in good faith, further conflict, and retreating to a place of supposed security from the attack of Webb, decisive of his right to defend himself there, when afterward assaulted by Webb and those in concert with him, and, if necessary to save his own life, without malice or premeditation to take that of Webb: while the other makes the *conduct* of *Webb* the test whether the conflict had so far terminated as to restore the accused to his right of self-defence, and denies him this right, if the conduct of Webb, from the conflict on the street to that in the house, was to be regarded as continuous. We are not permitted to regard this retreat of the accused, as either colorable, or made to gain an advantage, with a view of renewing the assault upon Webb. The instruction requested assumed that it must have been made with the *bona fide* purpose of abandoning the conflict; and in the instruction given, the jury were charged that if the attack upon Webb in the street

was murderous, the fact that the accused "repented and fled, * * * * * intending to quit the combat, and abandoning all murderous purpose," would have no further effect than to mitigate the crime to manslaughter.

Upon the precise question made in this case, very little light is thrown by actual adjudications; and it is not to be denied, that some difference of opinion has obtained among elementary writers upon criminal law.

The learned and humane Sir Matthew Hale has expressed an opinion, upon the very point, in accordance with the instructions requested in the Court below. He says: "Suppose that A. by malice makes a sudden assault upon B., who strikes again, and, pursuing hard upon A., A. retreats to the wall, and, in saving his own life, kills B. Some have held this to be murder, and not *se defendendo*, because A. gave the first assault. But Mr. Dalton thinketh it to be *se defendendo*, though A. made the first assault, *either with or without malice*, and then retreated. *It seems to me*, that if A. did retreat to the wall upon a real intent to save his life, and then merely in his own defence killed B., that it is *se defendendo*, and with this agrees Stamford's P. C., *lib.* 1, c. 7, fol. 15 *a.* But if, on the other side, A., knowing his advantage of strength, or skill, or weapon, retreated to the wall merely as a design to protect himself under the shelter of the law, as in his own defence, but really intending to kill B., then it is murder or manslaughter, as the circumstance of the case requires." 1 Hale P. C., 479, 480.

Sergeant Hawkins, however, thinks this opinion too favorable, and insists that the one who gives the first blow cannot be permitted to kill the other, even after retreating to the wall; because the necessity to which he is at last reduced, was brought upon himself. 1 Hawk. P. C. 87.*

Later English writers have generally contented themselves with stating the opposing opinions of these emi-

*Curw. Ed.

nent authors, without adding anything material upon the subject. 4 Bla. Com., 186; 1 Russ. on Crimes, 662.

In our own country, Mr. Bishop, in his work on Criminal law, has examined the whole subject with learning and ability, and coinciding, as we understand him, in the opinion expressed by Lord Hale, he thus expresses his own conclusion: "The space for repentance is always left open. And when the combatant does in good faith withdraw as far as he can, really intending to abandon the conflict, and not merely to gain fresh strength or some new advantage for an attack, but the other will pursue him, then, if taking life becomes inevitable to save life, he is justified." 2 Bishop on Crim. Law., Sec. 566.^b

But if the question cannot be said to be settled upon authority, we think its solution upon principle very obvious, in the light of doctrines upon which we are all agreed. It is very certain that while the party who first commences a malicious assault continues in the combat, and does not put into exercise the duty of withdrawing from the place, although he may be so fiercely pressed that he cannot retreat, or is thrown upon the ground, or *driven* to the wall, he cannot justify taking the life of his adversary, however necessary it may be to save his own; and must be deemed to have brought upon himself the necessity of killing his fellow-man. "For otherwise," as said by Ch. J. Hale, "we should have all cases of murder or manslaughter, by way of interpretation, turned into *se defendendo*." 1 Hale, P. C. 482.

There is every reason for saying, that the conduct of the accused, relied upon to sustain such a defence, must have been so marked in the matter of time, place and circumstance, as not only clearly to evince the withdrawal of the accused, in good faith, from the combat, but also such as fairly to advise his adversary that his danger had passed, and to make *his* conduct thereafter, the pursuit of vengeance, rather than measures taken to

^bVol. 1, 5th Ed., § 871.

repel the original assault. But when this is made to appear, we know of no principle, however criminal the previous conduct of the accused may have been, which allows him to be hunted down and his life put in jeopardy, and denies him the right to act upon the instinct of self-preservation, which spontaneously arises alike in the bosoms of the just and the unjust. There is no ground for saying that this right is forfeited by previous misconduct; nor did the Court below proceed upon any such idea, since the jury were charged, that if the conflict which ensued upon the first assault had ended, and a new one was made by Webb and his associates in the house, the accused under reasonable apprehension of loss of life or great bodily harm, would be justified in taking the life of his assailant.

The error of the Court consisted in supposing that whatever might be done by the accused to withdraw himself from the contest, the conflict would never end so long as Webb made continuous efforts to prolong it. If this is a sound view of the matter, the condition of the accused would not have been bettered if he had fled for miles and had finally fallen down with exhaustion, provided Webb was continuing in his efforts to overtake him. But this view is consistent with neither the letter nor spirit of the legal principle. A *conflict* is the work of at least two persons, and when one has wholly withdrawn from it, *that* conflict is ended; and it cannot be prolonged by the efforts of him who remains to bring on another. It is very true, that the original assault may have aroused the passions which impel the pursuer to take vengeance upon his adversary; and if death should ensue from his act, it might be entirely sufficient to mitigate the crime. But it would still be a crime, and the law cannot for a moment tolerate the execution of vengeance by private parties. If this were allowed, such passions might be as effectually aroused by words as blows; and instead of the principle, so vital to the peace of society, that the law alone must be relied upon for the redress of all injuries, we should have avengers of

injuries, real or supposed, executing their punishments upon victims stripped of all legal power, whatever might be the necessity of defending their own lives. It is needless to say, that such a course would be alike destructive to public order and private security, and would be substituting for the empire of the laws, a system of force and violence.

A line of distinction must be somewhere drawn, which, leaving the originator of a combat to the necessary consequences of his illegal or malicious conduct, shall neither impose upon him punishments or disabilities unknown to the law, nor encourage his adversary to wreak vengeance upon him rather than resort to the legal tribunals for redress; and we think, upon principle and the decided weight of authority, it lies precisely where we have indicated. While he remains in the conflict, to whatever extremity he may be reduced, he cannot be excused for taking the life of his antagonist to save his own. In such case, it may be rightfully and truthfully said, that he brought the necessity upon himself by his own criminal conduct. But when he has succeeded in wholly withdrawing himself from the contest, and that so palpably, as at the same time, to manifest his own good faith, and to remove any just apprehension from his adversary, he is again remitted to his right of self-defence, and may make it effectual by opposing force to force, and, when all other means have failed, may legally act upon the instinct of self-preservation, and save his own life by sacrificing the life of one who persists in endangering it.

If these views are correct, their application to the case under consideration, is very obvious. Both the instructions requested, and that given, are based upon the hypothesis, that the accused had, in good faith and abandoning all criminal purposes, withdrawn from the combat, that he had not only retreated to the wall, but behind the wall; and had not only gone from the view of his adversary, but to a place of supposed security from his attacks. In all this his conduct was strictly

lawful. In the language of the books, he "had actually put into exercise the duty of withdrawing from" the place." It is very true, that the evidence tended to implicate him in a very serious crime in the first attack upon Webb, for which his subsequent conduct could not atone, and for which he was then, and still is, liable to prosecution and punishment; but when Webb and his associates afterwards pursued and attacked him, they were wholly in the wrong, and necessarily took upon themselves all the hazards of such an unlawful enterprise.

* * * * *

We think the Court erred in refusing to give each of the instructions requested, and also in the instructions given, and for that cause the judgment is reversed; and the case remanded for further proceedings.

BRINKERHOFF, Ch. J., and SCOTT, WILDER and WHITE, JJ. concurred.

Judgment reversed.

NOTE.—I. Let us first consider in a general way the question which lies at the foundation of Stoffer's case, and which is discussed in the case preceding it. Let us consider how far a man parts with his right of defence by seeking an affray or voluntarily engaging therein, or by bringing upon himself an attack. In other words, let us see how far one's right of defence is compromised or abridged by his own wrongful act.

1. The first general principle which is to be noted under this head is, *that a person who has slain another, cannot urge in justification of the killing, a necessity produced by his own unlawful or wrongful act.* This principle is thus stated by Sergeant Hawkins: "Neither shall a man in any case justify the killing another by pretence of necessity, unless he were himself wholly without fault in bringing that necessity upon himself; for if a man in defence of an injury done by himself, kill any person whatsoever, he is guilty of manslaughter at least; as where divers rioters wrongfully detain a house by force, and kill those who attack it from without, and endeavor to burn it." 1 Hawk. P. C., 82, 83, Curw. Ed. It is thus stated in Rippey's case, *post.* "A real or apparent necessity, brought about by the design, contrivance or fault of the defendant is no excuse." And thus in Adams' case, *ante*, p. 211: "The defendant cannot avail himself of necessary self-defence, if the necessity of that defence was brought on by the deliberate and lawless act of the defendant in bantering Bostic to a fight for the purpose of taking his life, or committing a bodily harm upon him, and in which he killed Bostic by the use of a deadly weapon." So, in Neeley's case, *ante*, p. 102, the law was held correctly stated in the following instruction: "If
* * * the defendant brought on the difficulty by voluntarily re-

turning to the vicinity of the deceased, with a deadly weapon, for the purpose of provoking a difficulty, [or, as was given in another instruction, for the purpose of having an affray,] his plea of self-defence would be of no avail; and, in that case, it would make no difference who fired the first shot." And the Court add: "What we mean is, that if the prisoner with a loaded weapon, sought the deceased with the view of provoking a difficulty, or with the intent of having an affray, and a difficulty did ensue, he cannot, without some proof of a change of conduct or action, excuse the homicide on the ground that the deceased fired the first shot."

In *Stonecifer's* case, 6 Cal., 407, the following instruction was held rightly refused, because it assumed that the prisoner was nowise in fault, and had no reference to the circumstances which induced the belief of imminent danger: "That if the defendant had reason to believe, and did really believe that he was in imminent danger of losing his life, or of incurring serious bodily harm, and really, in good faith, acting under that belief, killed Richardson, he was justified." The Court say: "It will not do to say that a party may commence an affray, and when he is about to suffer the penalty of his temerity, may take the life of his adversary to avert the danger that threatens him." From this ruling it would seem proper, in most cases, to qualify instructions on the law of self-defence, by saying that the accused must have been without fault in bringing upon himself the supposed necessity.

In a Georgia case the doctrine is thus stated: "The slayer himself must be faultless; he must owe no duty to the deceased; he must be under no obligation of law to make his own safety a *secondary* object; otherwise he is answerable to the law of the land, without any immunity under the shield of necessity." *Haynes v. The State*, 17 Ga., 465, 484—referring, doubtless, to the doctrine of *Holmes' case*, *post*, that the slayer must be equal with the slain in respect of the right to exist.

In a late case in the Supreme Court of Missouri, *WAGNER, J.*, speaking for the Court, said:

"The instructions, which are numerous, taken as a whole, constitute a fair presentation of the law. The fifth given for the prosecution, is the most strenuously opposed in this Court, and that told the jury that the right of self-defence does not include the right of attack, and that a party who seeks and brings on a difficulty cannot avail himself of the doctrine of self-defence in order to shield himself from the consequences of killing his adversary, however imminent the danger in which he may have found himself in the progress of the affray. Nor in such case would the father be justified in killing the adversary of the son, provided the son had provoked and brought on the conflict in which the son was so placed in imminent danger during the progress thereof; provided always that the father knew that his son had sought or brought on the difficulty.

"There is certainly no law to justify the proposition that a man may be the assailant and bring on an attack, and then claim exemption from the consequence of killing his adversary on the ground of self-defence. While a man may act safely on appearances, and is not bound to wait until a blow is received, yet he cannot be the aggressor and then shield himself on the assumption that he was defending himself.

"So, in defending his family he may not do for them what he would not

be warranted in doing for himself."—The State v. Linney, 51 Mo., 40.

In Vaiden v. Commonwealth, 12 Gratt., 717, Court of Appeals of Virginia, the question how far one's right of defence is compromised by his own wrong, is considered at some length. As in Adams' case, *ante*, this question was the one on which the case turned. The conclusions of the Court, as well as the facts on which they are based, sufficiently appear from the following extract from the opinion, delivered by LEE, J.:

"The fact of the homicide by the prisoner is not controverted, and the jury by their verdict have ignored the malice, which is necessary to constitute murder, and have convicted the prisoner of manslaughter. But it is urged on his behalf, that the killing was clearly in self-defence, and that, upon that ground, he should have been wholly acquitted.

"When a man is assaulted in the course of a sudden brawl or quarrel, he may, in some cases, protect himself by slaying the person who assaults him, and excuse himself on the ground of self-defence. Before a party thus assaulted, however, can kill his adversary, he must have retreated as far as he safely could to avoid the assault, until his further going back was prevented by some impediment, or, as far as the fierceness of the assault permitted. He must show the jury that the defence was necessary to protect his own life, or to protect himself against grievous bodily harm. 4 Bla. Com., 184; 1 Hale P. C., 481 *et seq.*; 1 Russ. on Cr., 661. And with regard to the necessity that will justify the slaying of another, it should seem that the party should not have wrongfully occasioned that necessity; for a man shall not in any case justify the killing of another by a pretence of necessity, unless he were without fault in bringing that necessity upon himself. 1 Hawk. P. C., ch. 10, § 22, p. 82, Curw. Ed.; 1 Russ. on Cr., 669; 1 Hale P. C., 405.

"Now it appears that on the night in question, the deceased was at the house of the prisoner, where a marriage was expected to take place; and he and the prisoner were drinking and playing cards together. An altercation took place between them, growing out of the deceased charging the prisoner with cheating. The wife of the prisoner then took hold of the deceased and reminded him of his promise to have no 'fuss' there. The deceased assented, immediately bade good night, and went out into the yard. There he remained, however, some five minutes, apparently enraged, cursing and talking loudly. While he was thus engaged, the prisoner took up his gun and walked towards the door, but was induced by his wife's persuasion to set the gun down. After he went out, deceased demanded his gun, which he appears to have left behind him in the house, and it was handed him through the door by Mrs. Vaiden. Deceased then went away on foot, in company with two other persons, who rode away on horseback, and George Vaiden, son of the prisoner, went with them as far as the drawbars, some two hundred yards from the house, for the purpose of letting them through. The deceased had been in conversation with George Vaiden, and after the party went through the gap, he continued the conversation with him, as they both stood together on the outside of the fence, leaning against one of the panels. The night was cloudy, but the moon was at its full, and the figure of a man could be distinguished at a distance of thirty yards. The conversation between the deceased and George Vaiden was of no unfriendly character, and had changed from the events

of the evening to a 'fracas,' which the deceased had had at Lunenburg Court-house, of which he was giving George Vaiden the particulars. While thus engaged, and when the prisoner had approached within fifteen feet of where they were standing, the deceased, according to the testimony of George Vaiden, suddenly exclaimed, 'Yonder comes the d——d old rascal, and I'll frail him now;' jumped over the fence, clubbed his gun about half-way of the barrel, and rushed upon the prisoner, who told him not to approach, or he would shoot him. Deceased, however, did not stop, and the prisoner gave back one or two steps, and when the deceased got within a few feet of him, fired. The deceased then struck the prisoner two blows with the breach of his gun, and then staggered back mortally wounded, and died a short time afterward.

"Now, it can scarcely be said that the homicide here occurred in the course of a sudden brawl or quarrel. The altercation had taken place at the house, and the deceased had gone away, to all appearances, peaceably, and had got out into the main road, and here he was standing conversing quietly with George Vaiden, when the prisoner followed him out; and this must have been between twenty minutes and half an hour after the deceased had left the house—ample time, certainly, for the irritation of the first altercation to have subsided. Still less can it be said, that the defendant was wholly without fault in bringing the necessity of killing the deceased upon himself, if such necessity did in fact exist. After the deceased had gone away, why should the prisoner have followed him with his gun? Why go out at all? If it be said that the prisoner may have been afraid his son might receive some harm at the hands of the deceased, the answer is, that there was no ground for any such apprehension. The deceased had no altercation with the son, nor had the latter participated in that which occurred between him and the prisoner. And if it be supposed that the prisoner might have thought that possibly his son might undertake to resent the insult offered to his father by the deceased, and then be brought into a difficulty with the prisoner [deceased], in which he might need his assistance, the prisoner could not but have discovered that any such apprehension was groundless; for he must have seen when he went out, and before he was observed by the deceased, that there was no quarrel between his son and the deceased, and that they were conversing in a quiet, and not unfriendly manner. He could discover them at a distance of about thirty yards, and yet he advanced to within about fifteen feet of them before he was observed by the prisoner. That he went out with his gun with the expectation of an affray, cannot be doubted, and it is far more probable that his object was to provoke one than to protect his son. In fact, whilst the deceased was still in the yard, and the prisoner's son yet in the house, the prisoner had taken up his gun and gone towards the door, unquestionably with a hostile purpose towards the deceased; but had yielded to the persuasion of his wife, and set the gun down. That such must have been his purpose is still further evinced by what he said to the witness, Yates, on the morning after the occurrence, when he informed him that he had killed the deceased. He added, that 'there was another d——d rascal in the neighborhood, who, if he didn't look sharp, would be killed too; that the deceased was a d——d dog, and ought to have been killed twenty years ago, and that somebody had to do it.' And he asked the witness if

he didn't think so? This was early in the morning, but the prisoner was sober; and it reflects a strong light upon the true character of the occurrences of the previous evening, and the motives and conduct of the prisoner. It tends to show that the necessity for slaying the deceased, if such necessity lay upon the prisoner, was of his own seeking, and self-imposed. He made no allusion in this conversation to any peril of his life in which he was placed by the assault made upon him by the prisoner, though he did say that the prisoner had struck him two blows on the head before he shot him. The necessity which seemed at that time to be impressed upon his mind was rather that of ridding the community of one who, although at that moment, lying stiff and cold in death on the ground in a fence corner, and slain by his hand, he stigmatized as a d——d dog, that ought to have been killed twenty years before, than of taking his life for the purpose of avoiding imminent danger of death to himself.

“Considering the whole conduct of the prisoner on the evening in question, in connection with the state of feeling which he avowedly entertained towards the deceased, I think it very difficult to say that he was free from fault upon that occasion, or that his case comes within the rules which render homicide justifiable or excusable on the ground of necessary self-defence. Nay, if the jury had gone further, and found the prisoner guilty of murder, it might be a matter of grave consideration whether the verdict could have been disturbed upon the ground that there was no sufficient evidence of malice, which is necessary to constitute the crime. Certainly I am not prepared to say, that this verdict is a plain deviation from right and justice, and that the evidence is clearly insufficient to warrant it.

* * * * *

“I think that no sufficient reason is shown for disturbing the verdict of the jury, and am of opinion to affirm the judgment.”

ALLEN, P., and MONCURE and SAMUELS, J., concurred. DANIEL, J., dissented. He thought the facts proved a case of homicide in self-defence.

Another case illustrating the same subject, is found in *Roach v. The State*, 34 Ga., 78. The defendant was indicted for the murder of Patrick Tye, and found guilty of voluntary manslaughter. Extract from the opinion of the Court, delivered by LUMPKIN, Ch. J.:

“The motion for a new trial is made on the ground of newly discovered testimony. Applications for a new trial on this ground are not favored by the Courts, and very properly not favored, for if they were favored, litigation would become endless. For this reason, the applicant is held to very strict rules. It is not one of those rules, as stated by counsel, that the evidence, if produced, *might* produce a different verdict. The rule is *might probably* produce a different verdict. The minds of men are so differently constituted, that it is impossible to say what might possibly be the effect of certain evidence. We may, however, have some idea as to the *probable* effect of evidence; for we are authorized to suppose that evidence will *probably* have that effect to which it is entitled. Is it probable that this newly discovered evidence would have produced a different verdict? I feel perfectly satisfied in my own mind that this evidence *ought not to produce* a different verdict; and, therefore, I conclude that it *probably* would not have produced a different verdict.

“To understand the weight and effect to which this new testimony is

entitled, we must take it in connection with the testimony had upon the trial. The new testimony is thus: The witness, John W. Counts, it seems, was standing on the corner of Montgomery and Brian streets, when he heard a row on the opposite side of the street, and on being informed that one of his company was in a row, went immediately over to see what was the matter. On going over, he looked *through a window* and saw five persons in the house. One was Roach. The other men were Tye, Welch, and two others unknown to witness. When deponent looked through the window he saw three men scuffling; they were Roach, Tye and Welch. Welch was between Roach and Tye, and had Roach around the waist shoving him back, and shoved him back until he got him in the corner, and while Welch was shoving Roach back, Tye struck Roach over Welch's shoulder, and then put his hand into his pocket, as if to draw a knife, when Roach stabbed him. This testimony, by itself, makes out a pretty fair case of self-defence; but when you connect it with what had happened *before the witness looked through the window*, it utterly fails to make out any such case. Let us see, then, what had happened previously. Thomas Rooney testifies that Tye, Roach and Welch, were talking about wrestling, running and jumping. After they had talked some time, they went into Welch's, next door, and continued to talk about wrestling, when Roach, said that he could get a man that could whip them, or something to that effect. As soon as he made that remark, Tye said that it was a lie. They instantly jumped up—the whole party. Welch got between them, *and Roach drew his knife and struck across Welch twice*; the first blow missed; the second, witness thinks, struck Tye, and cut him on the head. Welch then shoved Roach back into the corner, when he stabbed Tye. At the time Tye was struck over the head, he was behind Welch; the positions were the same at the time the stab was given. Roach reached Tye with his knife, who was behind Welch, by shoving it by Welch. Peter C. Cook confirms Rooney in the important fact that Roach drew his knife in the beginning of the difficulty, and struck twice at Tye, whilst Welch had hold of him, one of the blows taking effect. Dr. Moony confirms both of the witnesses by proving other wounds besides those which occasioned death, and which Counts saw from the window. How, then, does the matter stand? Roach had drawn his knife and inflicted a blow, if not two blows, before the fact occurred to which Counts testifies. Suppose that either of the two first blows had been fatal, would not Roach have been guilty? Was not the third blow, and which proved fatal, given in obedience to the same mad impulse that prompted the two first? It is a far-fetched idea to suppose that the third blow was given in self-defence. It is clear, to my mind, that it was but a continuation of the same murderous assault, with a deadly weapon, to which both the witnesses testify. If, at the moment it was necessary to this self-defence, he brought the necessity upon himself. Suppose I see a man in the act of shooting me, and to save myself, I rush upon him with a deadly weapon, would my attack upon him justify his shooting me? Would his shooting me be considered an act of self-defence? Would it not rather be considered as carrying out his original purpose? True, his shooting me might, at the moment, be necessary; but it is a necessity of his own creation, and cannot avail him as a defence. Such is the case before me. Roach had attacked with a deadly

weapon. No apprehension that a deadly weapon would be used to resist him, can justify him in the further use of his weapon. Such use must be considered as a carrying out of his original intention. Any other doctrine would give a loose rein to violence and murder. No man can attack another with a deadly weapon without *knowing* that he puts his life at hazard; and if this hazard is to justify him, then murder ceases to be a crime.

"The motion in arrest of judgment and the motion for a new trial are both overruled."

2. *With regard to the reason of the principle* thus stated and illustrated, it may be said to be a sort of criminal estoppel. It refers itself directly to the maxim, "No man shall take advantage of his own wrong." Thus, Mr. Broom says: "A man may not take advantage of his own wrong to gain a favorable interpretation of the law—*justitia legis auxilium quærit, qui in legem committit*. [He seeks the law in vain who offends against it.] Broom Leg. Max., 255. And thus Lord Hale: "*The party assaulted* indeed shall, by favorable interpretation of the law, have the advantage of this necessity, to be interpreted as a flight, to give him the advantage of *se defendendo*, when the necessity put upon him by the assailant, makes his flight impossible; *but he that first assaulted* hath done the first wrong, and brought upon himself the necessity, *and shall not have advantage of his own wrong*, to gain the favorable interpretation of the law that *that* necessity, which he brought upon himself, should, by way of interpretation, be accounted a flight, to save himself from the guilt of murder or manslaughter." 1 Hale, P. C., 482. "It is upon the plain principle," said WRIGHT, J., in Neeley's case, *ante*, p. 102, "that one cannot willingly and knowingly bring upon himself the very necessity which he sets up for his defence."

3. Let us next consider *the nature or quality of the act*, the doing of which will so far abridge one's right of defence, that, if he kill another, although to save himself from death or great bodily harm, he will yet be guilty of a felonious homicide in some of its degrees. This branch of the subject has not, as far as we know, been considered as a distinct topic by any text writer; nor has it been examined critically in any case which we have seen. Perhaps no general principle can be deduced from the cases. At least we shall not attempt this now, but shall proceed to examine separately the conclusions of some of them with reference to this point; and as this will involve some repetition, we shall be brief.

The doing of the following acts, then, has been held so far to abridge a man's right of defence, that if he thereupon kill another, he cannot be acquitted of all crime:

a. Commencing an assault, attack, or battery upon another. Hill's case, *ante*, pp. 199, 202, 204.

b. Attacking another with a deadly weapon. Roach v. The State, 34 Ga., 78.

c. Going to the place where the person slain is, with a deadly weapon, for the purpose of provoking a difficulty, or with the intent of having an affray. Neeley's case, *ante*, pp. 96, 102; followed in Benham's case, *ante*, p. 115, 122; Vaiden v. Com., 12 Gratt., 717.

d. Using provoking language, or, it seems, resorting to any other de-

vice, in order to get another to commence an assault, so as to have a pretext for taking his life. Stewart's case, *ante*, p. 191; Adams' case, *ante*, p. 208. Or in order to have a pretext for inflicting on him bodily harm. Adams' case, *ante*, p. 208.

e. Provoking another for the purpose of bringing him into a quarrel, or so that an affray is commenced. Selfridge's case, *ante*, p. 24. [This is said in general terms, without reference to the character of the provocation.] But it seems that no words, nor libellous publication, however aggravating, will compromise his right of defence, if in consequence of the same he is attacked; for no words, of whatever nature, will justify an assault. Selfridge's case, *ante*, p. 25. But query?

f. Agreeing with another to fight him with deadly weapons. Evans' case, *post*. And see Hill's case, *ante*, p. 206.

g. It is possible that there may be cases of wrong-doing to which both parties consent, and which are not punishable by law, which may impair one's right of defence in case he is attacked by the other. Thus, where a saloon-keeper sold a man liquor by the drink, upon which he became intoxicated, and returned late at night and forced his way into the saloon, and endeavored to provoke a difficulty with the proprietor, and made an assault upon him, but without weapons; and thereupon the proprietor shot and killed him, and upon his trial urged that the killing was done in self-defence,—DILLON, J., said: "The conduct of the deceased was highly blameworthy. He it was that provoked the difficulty, instigated, doubtless by the liquor which he drank, and to which he became a victim. The only mitigation which his conduct finds, if it finds it at all, is in the fact that he was intoxicated, and in part by liquor sold to him by the defendant. It would not do to hold that a saloon-keeper may sell a man that which steals away his senses, overthrows his judgment and clouds his reason, and then, himself being in no serious danger, shoot him dead because he is unreasonable, insulting and quarrelsome." *State v. Decklotts*, 19 Iowa, 447. But see *Pierce v. Hicks*, *post*.

4. It finally remains to consider of what *degree of homicide* a person is guilty who provokes the combat or produces the occasion in which he is forced to kill another in his own defence. A full discussion of this question might lead us into many nice distinctions, and take us beyond the reasonable limits of a note. We shall only advert to two leading distinctions:

1. If he provoked the combat or produced the occasion, in order to have a pretext for killing his adversary or doing him great bodily harm, the killing will be murder, no matter to what extremity he may have been reduced in the combat. 1 Hawk. P. C., p. 87, §18, and p. 97, §26, Curw. ed.; Hill's case, *ante*, pp. 202, 203; Stewart's case, *ante*, p. 191; Adams' case, *ante*, p. 208; Evans' case, *post*.

2. But if he provoked the combat or produced the occasion without any felonious intent—intending, for instance, an ordinary battery merely, the final killing in self-defence will be manslaughter only. Adams' case, *ante*, p. 208.

And, 3, we have seen from the principal case, that if he fairly decline the contest, and retreat as far as he can, and then kill his adversary in self-defence, the killing will be excusable.

II. All the books on criminal law contain supposable cases of A.

assaulting B., or of A. and B. meeting in mutual combat, and of A. withdrawing from the combat and retreating, and being pursued by B. to the wall, turning upon B. and killing him out of mere necessity in order to avoid his own immediate death: conjecturing whether such killing would be excusable or felonious, and if the latter, what grade of homicide the offence would be. And the difference of opinion among the text writers is as great as it could be; for while some, like Lord Hale and Mr. Bishop, have conjectured that it would be excusable self-defence, others, like Sergeant Hawkins and Mr. East, have thought that it would be murder.

And first, Sir Michael Foster, a very high authority on the law of homicide, after supposing several cases, says: "The cases here put suppose that the first assault was made upon the party who killed in his own defence. But as in case of manslaughter upon sudden provocations, where the parties fight on equal terms, *all malice apart*, it mattereth not who gave the first blow; so in this case of excusable self-defence, I think the first assault in a sudden affray, *all malice apart*, will make no difference, if either party quitteth the combat and retreateth before the mortal wound be given. But if the first assault be upon malice, which must be collected from circumstances, and the assailant, to give himself some color for putting in execution the wicked purposes of his heart, retreateth, and then turneth and killeth, this will be murder. If he had killed without retreating, it would undoubtedly have been so; and the craft of fleeing rather aggravateth than excuseth, as it is a fresh indication of the *malitia* already mentioned, the heart deliberately bent on mischief." Foster, 277.

This language refers to two cases: 1. Where two persons fight upon equal terms, upon sudden heat, and without malice; and, 2, where the original assault was malicious, *and* the retreat feigned. But neither of these is like the principal case; for here the parties did not fight on equal terms, in heat and without malice, but the one made a malicious assault upon the other with a deadly weapon; but although the original assault was malicious, yet the retreat was not feigned, but in good faith. Foster's conclusion as to what the law would be in case of a feigned retreat, does not differ from what is intimated in the principal case, and states a doctrine to be found in all the books. 1 Hale P. C., 482; 2 Whart. Crim. Law, §1021, 6th ed.; Hodges v. The State, 15 Ga., 117; Hill's case, *ante*; Lord Morley's case, Kelyng, 58. Such a device would afford the strongest possible proof of express malice. Hill's case, *ante*.

Mr. East takes a very clear view of the question, though very different from that taken in the principal case. He says: "Neither does it lie in the mouth of a party first making a felonious attack upon another, without any lawful provocation, to urge, even in alleviation, this plea of necessity in self-defence, though perhaps, it existed in fact. For if A., of malice prepense, assault B. to kill him, and B. draw his sword in his lawful defence, and attack A. and pursue him, and then A. for his own safety give back and retreat to a wall, and B. still pursuing him with his drawn sword, A. to save his own life kill B., this is murder in A.; for A. having attacked and endeavored to kill B. upon malice in the first instance, he is answerable for all the consequences of which he was the original cause. And the attack and pursuit of B. shall not excuse him; *because it was lawful in B.*

to pursue A. until he was entirely out of danger; which he could not be said to be, so long as A. might renew his attack. *A fortiori*, the same rule holds, if A. had merely feigned to retreat in order to give himself a color for wreaking his malice against B. It is true, that Lord Hale, in treating upon this subject, puts the case that A. by malice, makes a sudden assault upon B., who strikes again, and pursuing hard upon A., A. retreats to the wall, and in saving his own life, kills B., which he supposes would be only self-defence, grounded upon the opinion of Dalton. But the case in Dalton is merely that of a sudden affray; and in order to reconcile the above passage with all the other books, and with other passages of the same author, it must be understood, that he is not speaking of a felonious assault with malice by A., with intent to kill B. *unprepared*; but either such an assault as could no way endanger him, or, at least, upon mutual combat; and even then, if the first assault were with malice, in the legal understanding of the term, the opinion deserves further consideration, as will appear hereafter." 1 East P. C., 278-9. Further on, pp. 283-285, Mr. East criticises Lord Hale's position at length, and with much force of reasoning. This part of his text will repay an attentive perusal. He argues that, whereas a person who is feloniously assailed, has a right to pursue his assailant until he finds himself out of all danger, such original assailant can consequently have no right to turn and resist. Concerning this last position, it may be observed, that some of the American cases, so far from sanctioning this right to pursue, go so far as to require him who is feloniously assailed to retreat, if he safely can, before killing. See, for instance, PARKER, J., in Selfridge's case, *ante*, pp. 17-18; John Doe's case, *ante*, p. 62; Drum's case, *ante*, p. 189. But this does not appear to be the better opinion. See note to Selfridge's case, *ante*, p. 28, *et seq.*, and note to James D. Kennedy's case, *ante*, p. 139, where the question is discussed. Also Young's case, *post*; State v. Hodges, 15 Ga., 117.

In the course of this discussion, Mr. East says, that "it is laid down in many books that if a man assault another upon malice prepensed, and then fly to the wall, and there kill him in his own defence, he is guilty of murder in respect of his first intent. And he cites 1 Hawk. ch. 29, § 17, and ch. 31, § 20, [old edition]; Foster, 276-7, [quoted *supra*]; Kelyng 58, 128-9; 4 Bla. Com., 185; 2 Ld. Raym., 1491, [Oneby's case].

Hawkins says, "It is now agreed, that if a man strike another upon malice prepense, and then fly to the wall, and there kill him in his defence, he is guilty of murder." 1 Hawk. P. C., p. 87, § 18, Curw. Ed.

The citation which Mr. East makes to p. 128-9 of Kelyng's Reports, we have given in full in the note to James D. Kennedy's case, *ante*, p. 142. The citation to p. 58 of Kelyng, refers to one of the resolutions of the Judges of King's Bench, when they met at Sergeant's Inn, in anticipation of Lord Morley's trial, April 28, 1666. It is as follows: "If A. hath malice against B., and meeteth him and striketh him, and then B. draweth at A., and A. flyeth back until he come to a wall, and then kills B., this is murder, notwithstanding his flying to the wall; for the craft of his flying shall not excuse the malice which he had, nor shall any such device to wreak his malice on another, and think to be excused by law avail him anything, but in such case the malice is enquirable, and if that be found by the jury, then his flight is so far from excusing the crime that it aggravates it. Crompt.

Just., 22 b. ; Fitz. Cor., 287." It is seen that this refers to a feigned retreat, and not to a withdrawal from the combat in good faith, like the principal case.

In considering this subject, we are then brought face to face with a conflict of doctrine, which may best be stated in the concrete, thus : If Webb, the person slain in the principal case, had the right to *pursue* Stoffer, then as long as that right continued, Stoffer had no right to turn and resist ; and if he resisted and killed Webb, while Webb's right to pursue continued, he was guilty of murder in respect of the intent with which he made the original assault. *E converso*, the conclusion reached by the Court, that Stoffer was excusable in killing Webb, necessarily carries with it the conclusion that Webb had no right to pursue, after Stoffer had fairly declined further combat and retreated. By no device of reasoning can this conclusion be evaded. Stoffer's case, then, may be fairly said to decide that where one is murderously assailed, but resists the assailant with such vigor that the latter is forced to fly, the assailed has not the right to pursue, if the assailant fairly notifies him that his retreat is made in good faith.

Under what circumstances, then, does the right to pursue exist, and how long does it continue ?

It does not exist in cases of mutual combat ; for here the law requires both parties to withdraw from the conflict and desist. This will appear from an examination of any of the cases of the preceding SUBDIVISION ; and from the following, taken from a late case in Virginia, which contains the usual statement of the doctrine :

The Circuit Judge charged the jury, that " Where death ensues on a sudden provocation or sudden quarrel, without malice prepense, the killing is manslaughter ; and in order to reduce the killing to self-defence, the person must prove two things : 1. That before the mortal blow was given, he declined further combat and retreated as far as he could with safety ; and, 2, that he killed the deceased through the necessity of saving his own life, or to save himself from great bodily harm. And this language was approved in the Court of Errors. *Dock v. The Commonwealth*, 21 Grat., 912, 913.

It may be added that an apt definition of " mutual combat " is given in a late Georgia case, which has just come to hand. *MCCAY, J.*, said : " We think the Judge was in error in saying there must be *mutual blows* in order to constitute a mutual combat. There must be a *mutual intent to fight*. But we think if this exists, and but one blow be stricken, that the mutual combat exists, even though the first blow kills or disables one of the parties." *Tate v. The State*, 46 Ga., 157, 158.

Nor does the right to pursue exist in a case of non-felonious assault ; for here, although the law permits the assailed to use force in his defence, yet it permits the use of no more force than is necessary to accomplish that defence. *Gallagher's case*, *post*, and note. And when the assailant has withdrawn and fled, it is manifest that no more force is necessary, unless he is merely retreating to gain a fresh advantage.

Leaving out the cases where pursuit may be instituted for the purpose of arrest, a discussion which would be foreign to the purposes of this volume, it may be said in the first place, in the language of the old writers, that the right to pursue in cases of private defence accrues only where a forcible

ble felony, such as robbery, rape, murder, arson, or burglary, has been attempted *by violence or surprise*. Foster, 273; 1 East P. C., 271. And see *R. v. Mawgridge, Kelyng*, 128, 129; PARSONS, Ch. J., in *Selfridge's case*, *ante*; Collins' case, *post*; Pond's case, *post*; Carroll's case, *post*; Young's case, *post*.

And following the same language, the right continues until the person assailed "finds himself out of all danger." Foster, 273; Collins' case, *post*. Or, "until he has secured, or freed himself from all danger." 1 East P. C., 272; PARSONS, Ch. J., in *Selfridge's case*, *ante*, p. 4; Carroll's case, *post*. Or, "until he may *reasonably believe* he is secure from danger." Young's case, *post*.

And this brings us to a conclusion, which, although not stated by any text writer, nor in any case which we have seen, yet, nevertheless enforces itself conclusively upon the understanding; which is, that the right to pursue after a felonious attack or attempt, rests alone upon that *law of necessity* which constitutes in all cases, and without exception, the basis of the right of private defence. In other words, if it is necessary for the assailed to pursue in order to protect himself from a renewal of the felonious attack, he may lawfully pursue; and his right to pursue continues as long as this necessity continues, and ceases when the necessity ceases. And further, the test of this necessity is the *reasonable belief* of the person assailed. Young's case, *post*. In other words, and by strict analogy to the doctrine of many cases, he may lawfully pursue as long as the appearances of danger are such as reasonably to make such pursuit seem necessary, in order to save himself from a fresh attack, although such necessity may not, in point of fact, exist. See Shorter's case, *post*; Logue's case, *post*, and other cases of that class. And it would also hold true in this case as in others, that whether this necessity which alone can give the right to pursue, existed to the comprehension of a reasonable man, would be a question of fact to be finally resolved by a jury, according to the usual tests of human conduct and experience, *Selfridge's case*, *ante*, p. 27; Shorter's case, *post*; Logue's case, *post*, and others.

It may not be a digression to state here that the doctrine intimated by Lord Coke—3 Inst. 56—that a felon may be killed in attempting to commit a felony, *without any inevitable cause*, does not exist at the present day. If such a rule ever did exist, it may be truly said that in this, as in many other features of the common law, "the rough ages have grown mild." If such a rule existed in Lord Coke's time, it doubtless had its foundation and support in the fact that then all felonies were punishable with death; and therefore, he who slew a felon in the act of committing a felony was deemed to have been promoting public justice, for he did no more than save the ministers of the law that trouble. But the larger number of felonies known to the codes of the present day is punishable by imprisonment, or by fine and imprisonment only. The reason of so rigid a rule having thus in a great measure ceased, the rule itself has also ceased with it, and it may now be said without questioning, that in no case may a person resisting the commission of a felony, kill the felon from choice; but, although he is not required in such cases to give back or retreat, any more than he was in Lord Coke's time,—3 Inst. 56—yet he may not lawfully kill the felon, if he can prevent the consummation of the felonious intent by other

means, as by arresting or disabling him, or the like. Pond's case, *post*; 1 Bish. Cr. Law, §§ 843, 875; Rex v. Scully, 1 Car. and Pay., 319. In other words, the same law of necessity is now held to apply to killing in defence against felonious attempts, as in other cases of private defence; and a killing in such cases must be shown to have been *necessary* to prevent the threatened felony. Bull's case, *post*. It is doubtless true, however, that where an attempt to commit some specific felony of a forcible kind has been clearly proved; where it is made plain that the execution of a felonious attempt had already commenced,—the law—that is to say, the jury under proper instructions—will not be scrupulously exact in judging of the necessity under which the felon may have been slain.

And whether a man may, in the United States at the present day, according to the doctrine of Mawgridge's case, *supra*, assume that one who has murderously assailed him, is not fit to be trusted as long as he has a dangerous weapon in his hand, and that the right to pursue and to kill in such pursuit, exists as long as the assailant continues thus armed, must be left with us to be resolved by a jury upon the circumstances of each case, and cannot be resolved by a bench of judges as in England, upon a special verdict, or where a trial takes place in the House of Peers.

Directing our attention, then, to those principles which should be expounded to a jury, in order to enable them to determine whether such a necessity as the law can recognize exists, for pursuing one who has attempted a felony upon the person or property of another, we may observe that a principle would seem to apply here which obtains with reference to attempts to commit crime generally, namely: that *the execution of the felonious design must have plainly commenced*. 1 Bish. Cr. Law, §§ 732, 762, 764, 843, 874. It will not be sufficient that the person who entertains such felonious design is *preparing* to execute it. Or, as was happily said by COWEN, J., in McLeod's case, *post*, the threatened danger must not exist in machination only. Or, to use expressions which are generally employed in cases of personal defence, the danger must be imminent to the comprehension of a reasonable man. Shorter's case, *post*; Sullivan's case, *ante*. The appearances must be such as to convince a reasonable man that the threatened calamity is then about to fall. Logue's case, *post*; Pond's case, *post*; Campbell's case, *post*; and others. And a large number of cases hold that nothing short of some *overt act* on the part of the assailant will constitute such appearances. Scott's case, *ante*; Dyson's case, *post*; Head's case, *post*; Lander's case, *post*; Williams' case, *post*. It is true that there are some cases in Kentucky which dispute this principle in cases where a man has already escaped from assassination. Philip's case, *post*; Carico's case, *post*; Young's case, *post*; Bohannon's case, *post*. And there are others that state that no general rule can be laid down upon the subject. Cotton's case, *post*; Robt. Jackson's case, *post*; Patten's case, *post*. The more reasonable rule would seem to be, that certainty in point of fact, rather than immediateness in point of time, should be the test of the right to strike in one's defence. But the principle that the person having the felonious design must be *doing something at the time* indicating a present intention of carrying his design into effect, has been undoubtedly the law ever since Lord Hale's time. 1 Hale, P. C., 52; 1 Bish. Cr. Law, §§ 843, 872; note to Grainger's case, *post*.

If, therefore, the right to strike in one's defence does not accrue until the danger is, to all reasonable appearances, immediate and impending, it is manifest that it must cease when the danger, to all reasonable appearances, ceases to be immediate and impending. We are thus brought to the conclusion that where a person has been feloniously assailed, and the felon has desisted from his attempt and taken to flight, *the right to pursue for the purpose of private defence ceases, as soon as, in the reasonable belief of the assailed, the danger has ceased to be immediate and impending.*

And the attempt to commit a felony being a misdemeanor only—unless in specific cases made felony by statute—the right of private persons to pursue for the purpose of arrest, does not, as a general rule, in such cases, accrue; at least, as we shall see further on in this volume, the right to take life in such pursuit, for the purpose of arrest, does not exist, unless a felony has actually been consummated. Rutherford's case, *post*; Roane's case, *post*.

The conclusion above italicised may not be found directly stated in any adjudicated case, but it results from the doctrine of many cases, and finds support in the case of Redding Evans v. The State, 33 Ga., 4. In that case the defendant was indicted for the murder of James Smith. A feud had existed for some time between Evans and Smith, growing out of a criminal intimacy between Evans and Smith's wife. Evans had on one occasion beaten Smith, and had then got into bed with Smith's wife in Smith's presence. He had also threatened, on several occasions, that he would kill Smith.

On the morning of the homicide, Smith went to the house where his wife and children were, because, he said, he had heard that Evans was going to run away with his wife, and he was going down after his children. Smith had been at the house where his wife lived but a few minutes, before Evans also came; and as Evans approached the house, Smith fired at him with a single-barreled shot-gun, and wounded him in the side. Evans then fired upon Smith five times, with a revolver, wounding him in the side, on the arm, and twice in the abdomen, of which he died in a few hours. Smith was *walking off* from Evans when the latter killed him. The accused was convicted of voluntary manslaughter, and moved for a new trial on the ground (among others), that the verdict was contrary to the evidence, as the killing was justifiable. The motion for a new trial being overruled, the case was taken to the Supreme Court; where, in delivering the opinion of the Court, JENKINS, J., said:

"There can be no doubt that the deceased came to his death by wounds inflicted by the plaintiff in error, with intent to kill him. The justification rests upon the alleged necessity imposed upon the plaintiff in error to kill the deceased, in order to save his own life. If this necessity appear from the evidence, the verdict should have been set aside and a new trial ordered. But if, on the contrary, it appear that the slayer was in no imminent danger when he inflicted the mortal wound; that the deceased had either made no assault on him, or had ceased from it and was retiring, it would be difficult to make out a case of self-defence.

"This defence rests mainly upon the fact that the deceased fired upon and wounded the plaintiff in error with a shot-gun. It is not very apparent from the evidence, whether this shot was made whilst the plaintiff in error

was in the act of drawing his pistol, or before he attempted to do so. But in the doubt attaching to this point, justice to the accused may entitle him to the assumption that the deceased leveled his gun and was in the act of firing, before the plaintiff in error drew, or attempted to draw, his pistol. This places the deceased in the position of assailant; but does it make out the defence? The evidence does not show either that the deceased continued the assault, or that he had the means of continuing a dangerous assault.

"The witnesses say he had a shot gun, but do not say it was a double barreled gun, or that the deceased had any other weapon, or was reloading, or was continuing to advance upon the deceased. On the contrary, two witnesses state distinctly that the accused shot four or five times at the deceased, inflicting as many wounds, and that while he was so shooting, the deceased was walking away from him.

"The testimony is that deceased had only a single-barreled shot gun, and after having delivered his fire, was powerless in the presence of a foe armed with a revolver. The jury were abundantly justified in drawing this inference from the evidence; and then the question would arise, did the accused inflict those four or five wounds upon the deceased, under excitement of reasonable fear for his personal safety, or was he prompted by a sudden, violent impulse of passion occasioned by the assault then done and ended. The verdict evinces that they arrived at the latter conclusion, and in view of the seventh, thirteenth and fifteenth sections of the fourth division of the Penal Code, we perceive in this finding no error of law or of fact. We sustain this verdict upon this ground, that *even immediately after an assault endangering life or limb, the killing of the assailant by the assailed will be manslaughter, if it be apparent that the assault, and with it the personal danger of the assailed, had ended, and that the mortal wound was inflicted as the assailant had ceased from the attempt and was retreating.*"

According to the doctrine of this case, if Webb had killed Stoffer in the pursuit, it would have been manslaughter. It follows, therefore, that Webb had no right to pursue, either for the purpose of defence or retaliation, although he might, perhaps, have done so for the purpose of arrest; and, having done so, and manifestly for the purpose of retaliation, that Stoffer might lawfully resist and kill, if necessary to his defence; for the final necessity was of Webb's, and not of Stoffer's creating.

The case of *Hodges v. the State*, 15 Ga., 117, affords a fair example of a retreat made to gain a fresh advantage, and, as illustrating the rule that in such cases the other combatant may follow up such retreat and strike, in order to secure himself from a renewal of the attack. The indictment was for stabbing, under the Georgia statute.

The facts and conclusions of the Court will sufficiently appear from the following extract from the opinion delivered by LUMPKIN, J.

"Is it true, as assumed, that Holt was retreating all the time from Hodges? And that the latter took advantage of the accidental fall of his adversary, to inflict upon him the injury which he did? Let us advert, for a moment, to a portion of the testimony: Thomas Ayers, who testified on the part of the State, says, that he saw the combatants retire to talk together. Soon words grew loud between them. Holt slapped his hands together, and struck Hodges. Hodges then dropped his hand on his thigh

and drew his knife ; Holt broke and run, and Hodges after him ; Holt got his knife out, and turned and cut Hodges, and then struck him with a piece of rail, and run again ; Hodges pursued Holt, when Holt fell, and he cut him ; Holt struck and cut Hodges, before Hodges cut ; Hodges received a considerable cut on the arm, and had a bruise on his face where Holt struck him. Sampson Cason was next examined on the part of the State : Holt and Hodges retired to talk ; they soon became loud and angry ; heard Holt say ; ' Hodges, this is an infernal lie ; ' Hodges retorted back the d—d lie ; he saw him run backwards with his hat off, and a scratch on his face ; he drew his knife and put at Holt ; Holt drew his knife and wheeled about ; witness' father said, ' Stop that, boys ; ' Hodges desisted ; Holt ran twenty or twenty-five yards ; got a rail off the fence, and returned upon Hodges ; Hodges threatened to kill him, if he struck him with the rail ; Holt aimed a blow with it, but missed Hodges, it being fended off by Hodges, or old Mr. Cason ; the rail struck the ground and was pulled out of Holt's hand ; he ran again four or five steps and fell, and Hodges cut him ; witness' father requested Hodges to stop, which he did ; Holt got up, ran a few steps, and picked up a limb, and coming back, said he could whip Hodges ; Hodges refused to fight him a fair fight, confessing, as he did at the beginning of the quarrel, that he was unable to do so ; but said, as they had commenced with knives, they must continue with them, or drop it altogether. It all occurred instantaneously. Counsel for defendant offered to prove by this witness that immediately after Holt arose, when he was cut, he seized a gun, and swore he would kill Hodges ; and that this was done twice ; and that he was prevented by the bystanders from carrying his threat into execution.

" I have only extracted a portion of the proof offered in support of the prosecution ; but it is sufficient to show that this was anything but a retreat on the part of Holt. If so, why did he turn upon Hodges, after succeeding in getting out his knife, and wound him in the arm ? Why, after he fled the second time, and Hodges discontinued the pursuit, by the request of old Mr. Cason, did he gather up a fence-rail, and returning, aim a deadly blow at his foe ? Does not the whole testimony establish that this was a running fight between the parties ? And that whenever Holt got the advantage, he exhibited a perfect willingness to renew the rencounter ? At any rate, should not the transactions have been left to the jury, to be by them considered in this light ? If such was its true character—and it seems to us that no one can, from the evidence in the record, doubt it—*then, unquestionably, Hodges was not compelled to wait until Holt could reassail him, but in the exercise of a wise precaution, he might anticipate the attack of Holt, by striking him at any time during the fight.*

" Hence the propriety and importance of letting in the testimony which was offered and rejected as to the after conduct of Holt. His seizing the gun and threatening, I might be warranted in saying, attempting to take the life of Hodges, was a part of the *res gestæ*, and demonstrated the *quo animo* with which he kept up the engagement.

" And hence, too, the propriety and importance of proving the physical inequality between the parties. Indeed, the justification of Hodges must depend, to some degree, at least, upon his bodily inferiority, which forbade the possibility of his encountering Holt upon equal terms. We hold, con-

sequently, that it was error in the judge to withhold this evidence from the jury."

As before intimated, the discussions carried on by the text writers with regard to the question determined in the principal case, are merely conjectures as to what the law should be, should such a contingency happen. And although in one well considered case,—Hill's case, *ante*—the conclusion of Sergeant Hawkins on the subject is quoted and approved; yet the circumstances of that case do not appear to have called for any expression of opinion on the point; for the slayer did not retreat, or attempt to retreat in that case, but it was a continuous combat from the first attack until the final killing. We state, though not with entire confidence, that Stoffer's case is the only case to be found in the books, where the three things concur necessary to an authoritative decision of the point in question: that is to say, where, (1), the slayer made a *felonious* assault upon the slain; and, (2), repented, declined further combat and fairly retreated to the wall; and, (3), being pursued to the wall, and there in turn assailed by the slain, did kill him out of necessity, and to avoid his own immediate death or great bodily harm. And it is from the analogy of cases where the combat was continuous, that it finds its chief support.

The case of Hittner v. The State, 19 Ind., 48, is, however, similar in some of its features. It differs from the principal case in this, that the original assault does not appear to have been felonious; and if the defendant was indeed "at the wall" when he did the killing, it does not appear whether he had retreated there, or had been driven there. But it was a case in which the Court thought that the accused had a right to the benefit of his supposed retreat, in the instructions given to the jury. The defendant was indicted for murder in the first degree, and convicted of manslaughter. He appealed to the Supreme Court. In delivering the opinion of the Court, HANNA, J., said:

"The exception above indicated, arises on that part of the instruction which relates to the law of self-defence. The charge given was, that 'if the parties quarrelled and got into an unpremeditated fight, and in the course of that fight the defendant, without any previous malice, in the sudden heat of the contest, pulled out his knife, and stabbed the deceased, that would be manslaughter, and, in such a case as that, in the absence of malice, it would make no difference who gave the first blow. The doctrine of self-defence must be considered with reference to the condition of the parties at the time. If the defendant was unlawfully attacked by the deceased, then he might resist, and lawfully kill the deceased, in necessary self-defence, if he had reason to believe, and did believe, it was necessary to kill to save his own life, or to avoid considerable personal harm; but if the defendant himself made the unlawful attack, or if there was a fight upon a sudden quarrel, then the defendant, if he killed the deceased, could not escape on the plea of self-defence. He would be guilty of manslaughter at any rate, and might be guilty of murder, if the facts indicated malice.'

"The defendant objects to the latter part of the charge, and insists that it is not only not good law, but that it prejudiced his defence. This latter part of the charge, when considered in connection with the former part of the same, appears to be susceptible of this construction only, viz.:

That the defendant would be guilty of manslaughter, if, in the absence of malice, he killed the deceased in a fight in which, first, he, the defendant, was the assailant; or, secondly, in a fight arising out of sudden heat, in which he did not strike the first blow.

"But one witness testified as to the commencement of the fight, in which the fatal blow was given. Several others testified in reference to its progress and termination. The witness who saw the whole transaction differed in his statements from those who saw a part only, as to that part, in this: Those who saw the latter part only, stated that the deceased had the defendant against a fence by the side of the highway, kicking him. The other stated, that the whole transaction took place in the public highway, where the defendant pulled the deceased off his horse, whereupon the deceased struck him, and received the fatal stab. If the evidence of those who saw the latter part of the transaction only should prevail, the jury might have inferred that the defendant had retreated, or been pushed to the wall—that is, to the fence—and then, with a pocket-knife, gave the blow which proved fatal.

"Whether he had or had not, a legal right to strike that blow, depended, in the opinion of the Court, upon a question of fact, namely: Were they fighting upon a sudden heat? or, was the defendant originally the assailant? If either question should be answered in the affirmative, then the defendant had no such legal right, although he was thus pushed, according to the instructions given. The instructions asked were based upon the idea that if, at the time of the killing, the defendant had reasonable ground for belief that such force was necessary to save his own life, or prevent grievous bodily harm, he might so act. The origin of the fight is not noticed.

"If A., a man of much strength, should, upon the spur of the moment, strike B., a weak man, and following up his advantage, should, in the commission of grievous bodily harm, receive a fatal, but unpremeditated blow, should B. receive the penalty of manslaughter? So, if in a like case, B. should strike a blow with his hand, and A., overstepping the bounds of mere defence, should proceed to commit such harm as should make it necessary for B. to strike with a weapon to save his life, would he be guilty of manslaughter in thus slaying A.?

"One ought not to have brought upon himself the necessity which he sets up in his own defence. 1 Hawk. P. C., p. 82, § 33, Curw. ed.; *Valden v. Commonwealth*, 12 Gratt., 717; *Haynes v. the State*, 17 Ga., 465. Or, if he has brought it on, he must put into actual exercise the duty of withdrawing from the place, that is, retreating to the wall, before he would be justified in striking the fatal blow. *Foster*, 277; *The State v. Hill*, 4 Dev. & Batt., 491, [*ante*]; *The State v. Howell*, 9 Ired., 485. And this falling back to "the wall" must be in good faith, a retreat or flight, and not a mere design to protect himself under the shield of the law. 1 Hale, P. C., 479, 480; 2 Bish. Crim. Law, 565, 1st ed."

In view of these authorities, the ruling of the Court appears to have been correct in refusing the instructions asked; but it was wrong upon the latter part of the instruction given, in view of the evidence in the case. It was not right to say to the jury, without qualification, that if the defendant made an unlawful attack, or got into a fight with the deceased, upon a sud-

den heat, and slew him in the controversy, 'he would be guilty of manslaughter at any rate.'

"The qualification of the charge, which we think should have been made, should have been directed to meet the settled principle of law above quoted, namely: giving the accused, under such circumstances, the benefit of his retreat, flight, or withdrawal from the contest, if the jury believed, from the evidence, that such was the fact, although he might have been the aggressor in the first instance.

"As this instruction may have misled the jury in determining the value of the evidence given, the judgment is reversed."

**D.—ACTING UPON APPEARANCES OF DANGER;
AND HEREIN OF THE IMMINENCE OF THE
DANGER; OF PREVIOUS THREATS
MADE BY THE ANTAGONIST, AND
ALSO OF THE CHARACTER
OF THE ANTAGONIST
FOR VIOLENCE.**

GRAINGER v. THE STATE.

[5 YERGER, 459.]

Supreme Court of Tennessee, March Term, 1830.

JOHN CATRON, *Chief Justice.*
ROBERT WHYTE, }
JACOB PECK, } *Judges.*
NATHAN GREEN, }

**KILLING THROUGH FEAR, ALARM OR COWARDICE, WHERE THE DANGER IS
UNREAL.**

1. If a man, though in no great danger of serious bodily harm, through fear, alarm, or cowardice, kill another under the impression that great bodily injury is about to be inflicted upon him, it is neither manslaughter nor murder, but self-defence. [See note, *sub fin.*]

2. If a man is in great danger of bodily harm, or thinks himself so, and kill another, it will be a killing in self-defence.

3. But if from the facts it appears he only believed that a violent assault and battery, without endangering his life, or inflicting great bodily harm, was intended, it is manslaughter.

In this case, the plaintiff in error was indicted in the Circuit Court of Henry county, for the murder of ——— Broach; was tried, convicted, and moved for a new trial on several grounds. His motion was overruled, and sentence of death being passed upon him, he appealed in error to this Court. The bill of exceptions shows the following facts, viz: On the 9th of July, 1829, Broach, the deceased, and Henson, were at Norwood's. Late in the evening, Grainger came there, and had his gun with him, which he generally carried, being a hunter. Broach and Henson were drinking cordial; Broach asked Grainger to drink with them; he replied he did not drink cordial, but would drink whiskey, and called for an half-pint. Broach and Henson drank three half-pints of cordial, and Grainger the half-pint of whiskey. All this time Broach and Grainger seemed friendly. Grainger was setting off for home; Henson asked him to wait for Broach; Grainger replied he knew Broach; that he would not go till he chose, and declined waiting for him. Henson went into the house, and requested Broach to go; he then returned, and he and Grainger set off together, leaving Broach at Norwood's. Henson was on foot and Grainger riding. The latter invited Henson to get up behind him, which he did. About three-eighths of a mile from Norwood's, Broach overtook them, riding at a fast gait. He immediately commenced a quarrel with Grainger, by charging him with having spoken disrespectfully of him, and that he had held his negroes until the children of Grainger had whipped them. Grainger denied the charges, said he had not said anything about Broach, or held his negroes, as charged. Broach said, "You are a liar, and if you deny it, I'll knock you off your horse." Grainger still denied the charges. Broach rode up to him and struck him a

violent blow on the breast. Grainger turned his horse suddenly away, and rode a short distance apart from Broach, saying to witness Henson, "Take notice, I will make him pay for it." The quarrel and ill language continued for about five-eighths of a mile further, when they came to the corner of Rainey's fence, about forty yards from the house. Grainger threw his leg over his horse's neck, and lighted on the ground, turned his horse to the fence, when Henson also alighted. At this moment Broach also alighted from his horse; Grainger threw his bridle over a rail, crossed the fence, and walked towards the house, saying to Henson, "You are in cahoot with Broach." Henson said, he had nothing against Grainger, who replied, "I don't know that you have." The house stood some ten yards inside of the line of fence, and forty yards in advance of where the parties alighted. Grainger walked inside; Broach and Henson outside. Opposite the house there was a gap. Rainey, his wife and two other women, were awakened out of their sleep by the violent quarrelling. The first Rainey heard was the defendant crying, Rainey, Rainey, like one afraid and calling for help. The women got up and looked through a crack of the cabin; Grainger was standing two or three yards from the wall, Broach advancing upon him, having passed through the gap. Grainger said to him, "I will shoot you if you follow me." Broach replied, "I am not afraid of your shooting, damn you, you would not shoot a cat; shoot!" Defendant said, "I have a mind to shoot you." Broach said, "Here I stand, shoot!" Defendant fired and killed Broach. Broach was eighteen or twenty feet from Grainger when the gun fired. The witness, Elizabeth Forbes, could not see Broach when he was shot, because he was in the shadow of a tree; but Henson, who was sitting on the fence in the gap, a few yards off, could see Broach, who advanced directly on Grainger without stopping, and whilst advancing, was shot. Henson also proves that Grainger said, when he first crossed the fence, "If Broach don't let me alone, I will shoot him." Broach said,

"You carry your gun to defend yourself." Grainger replied, "I do not."

CATRON, Ch. J., delivered the opinion of the Court:

The bill of exceptions shows, that much stress, on the trial, was laid upon the blow given by Broach to Grainger, to reduce the killing to manslaughter; that Grainger's passions had not cooled. He never had any passion; he was much alarmed, and with good cause. A man was on his horse behind him; he could not get away. Henson proves he did not pretend to prevent Broach from whipping Grainger, who believed, and most probably, rightfully, that Henson was in "cahoot" with Broach. It was Henson's duty to have protected Grainger, or got off from behind him, and left him free to escape from Broach.

Grainger used all the means in his power to escape from an overbearing bully. He was shuddering with fear, and his last hope of protection was defeated when Rainey's door continued closed against him, and Rainey did not come to his relief. He shot only to protect his person from threatened violence, and that great. It was certain. Henson sat quietly on the fence; the women and Rainey did not open the door; they were, no doubt, afraid of Broach, who displayed the traits of a reckless bully, and would have attacked Grainger the moment he reached him, as well in the house as 'out of it. It behooved Rainey not to permit the attack in a cabin amongst women and children, in the dark. He did right not to open the door. From Henson no assistance could be hoped; the women saw him quietly sitting on the fence, which, when Broach crossed, he helped himself over, by putting his hand on the shoulder of Henson. These are the facts as presented by the record before us.

Was there malice prepense in this case of homicide, so as to exclude the benefit of clergy, within the 23 Henry VIII, ch. 1? Did Grainger display a cold, deliberate and wicked conduct? A heart lost to all social order and fatally bent on mischief? It cannot be

believed. He behaved like a timid, cowardly man, was much alarmed, in imminent danger of a violent and instant assault and battery, and was cut off from the chances of probable assistance. That the act was the result of fear, hardly admits of doubt. It is equally certain to our minds, that Broach only designed to commit a trespass and battery upon the body of Grainger, without intending to kill him. If the jury had believed that Grainger was in danger of great bodily harm from Broach, or thought himself so, then the killing would have been in self-defence. But if he thought Broach intended to commit a battery upon him, less violent, to prevent which he killed Broach, it was manslaughter. 1 Hawk. P. C., ch. 28, § 23^a; 1 East C. L., 272. The judgment will be reversed, and the cause remanded for another trial.

Judgment reversed.

NOTE.—This case has been frequently quoted for defendants on trial for homicide, and as frequently overruled, explained or disregarded. The able judge who delivered the opinion, after sitting for a number of years on the bench of the Supreme Court of Tennessee, was appointed by President Jackson a justice of the Supreme Court of the United States, a position which he likewise held for a number of years. The Court whose opinion this is, was also one of high reputation, and in that reputation the reporter shared, and to it he contributed. His are perhaps the most valuable, and exhibit the most thorough command of the art of reporting, (now fast becoming one of the lost arts), of any of the Tennessee reports, except, perhaps, the single volume reported by Mr. Meigs.

In Tennessee, the office of reporter is filled by the Attorney-General; and in this latter capacity, it was the duty of Mr. Yerger to argue all State cases brought into the Supreme Court—a duty which he seldom delegated, and never failed to perform with ability. He was not only an able lawyer, but belonged to a family of able lawyers. His reputation, as well as that of the Court whose decisions he reported, had reached the State of Maine at an early day, and was recognized in Field's case, *post*, where the principal case is cited, though not by name.

His syllabus of the principal case, which we have retained, seems to be as fair a summary of the doctrine of the case as could be devised. It is seen that it places the right of defence upon the *fears* of the person defending, and not upon *reasonable appearances* of danger. It is scarcely necessary to cite authorities to show that this is not, and never has been, the law. With the single exception of a passage in Bacon's Abridgement, quoted by one of the counsel in Monroe's case, *post*, which is similar in terms to the first

^a Old edition.

paragraph of the syllabus, we have not found in any of the books we have examined, an authority in accord with Grainger's case, unless the Kentucky cases of Philips, Carico and Bohannon, *post*, can be understood as having such a meaning. On the contrary, it is not even the law in Tennessee; for, although it is declared in Rippy's case, *post*, that Grainger's case, as modified by Copeland's case, *post*, is undoubtedly the law, yet in the same case, it is also declared that no case has been more perverted and misapplied by advocates and juries; and that to constitute the defence that the homicide was excusable, "the belief or apprehension of danger must be founded on sufficient circumstances to authorize the opinion that the deadly purpose *then* exists, and the fear that it will *at that time* be executed." And in a later Tennessee case—Williams v. The State, *post*—the doctrine of Grainger's case, *as explained, analyzed and defined in Rippy's case*, is recognized as the governing law. And in another very recent Tennessee case—Robert Jackson v. The State, *post*—it is said that "the principle of self-defence laid down by this Court in the case of Grainger and subsequent cases modifying that case, while of vital importance, has, no doubt, been much perverted and misapplied, and when thus misapplied, has, no doubt, resulted often in the acquittal of guilty men."

"I think," said WILSON, J., in Shippey's case, *ante*, p. 133, referring to the principal case, "that this decision stands alone, unsupported by either principle or authority. Such belief would, perhaps, reduce the crime to manslaughter, but whether it would or not it is not necessary to decide in this case." So, in Shorter's case, *post*, BRONSON, J., referring to the principal case, said:

"This was, I think, going too far. It is not enough that the party believed himself in danger, unless the facts and circumstances were such that the jury can say he had reasonable grounds for his belief." In Lander's case, *post*, WHEELER, J., said that Grainger's case "has been the subject of much comment, and doubtless some misapprehension, as to what it was intended to decide; and its authority is, at least, questionable. The language of the Court seems not to have been sufficiently guarded. Nor does there appear to be any precedent or authority in law for the general principle announced by the case. But the opinion does not treat of the question presented in the present case, and there is, therefore, no occasion to examine the doctrines it asserts. But it may be remarked, that to do justice to the judgment of the Court in that case, it is necessary to look, not alone to the language of the opinion, but to the facts of the case presented to the mind of the Court; and to bear in mind that the question was not whether the accused was justifiable or excusable; (for it is evident that the Court did not intend to intimate that he was not guilty of manslaughter), but simply whether the homicide was, under the circumstances, 'of malice prepense, so as to exclude the benefit of clergy.'"

In a case in Georgia, an attempt was made to set up the doctrine of Grainger's case, but LUMPKIN, J., dismissed the question summarily as follows: "Was the Court right in refusing to give the written charge requested by counsel? The request was that the fears of a coward would justify homicide. The Penal Code says, the fears of a reasonable man; reasonably courageous, reasonably self-possessed." Teal v. The State, 22 Ga., 75, 84.

In California, the question arose upon the refusal of the Judge who presided at the trial, of an indictment for murder, to instruct the jury as follows: "That if the defendant had reason to believe, and did really believe, that he was in imminent danger of losing his life, or incurring serious bodily harm, and really in good faith, acting under that belief, killed Richardson, he was justified." MURRAY, Ch. J., said—HEYDENFELDT and TERRY, JJ., concurring:

"This instruction is bad, because it assumes that the prisoner was no wise in fault, and has no reference to the circumstances which induced the belief of imminent danger. It will not do to say that a party may commence an affray, and when he is about to suffer the penalty of his temerity, he may take the life of his adversary to avert the danger that threatens him; or that his cowardly fears of danger, if really entertained, would justify him in taking the life of another, without regard to the circumstances which excited those fears. The circumstances would be such as would excite reasonable apprehensions on the part of men of ordinary judgment and prudence." *People v. Stonecifer*, 6 Cal., 407.

In the same State, the attempt was again made to set up the doctrine of Grainger's case, and was disposed of by BURNETT, J.,—TERRY, Ch. J., concurring—as follows: "The fourth and fifth instructions offered by the defendant were substantially the same. The fifth was in these words: If the jury believe from the evidence that the defendant fired the fatal shot, under the impression that great bodily harm was about to be inflicted on him by the deceased, they must find the defendant not guilty. The instruction was properly refused, because it makes the 'impression' of the defendant the justification of the act, whether that impression was sufficient to excite the fears of a reasonable person or not. This was contrary to the thirtieth section of the act. Wood's Digest, p. 332, [Comp. Laws of Cal., 1853, p. 642, § 30.] Besides, the thirtieth section applies only to the cases mentioned in section twenty-nine. A reasonable fear and actual belief will excuse the party in *those* cases. But a reasonable fear and actual belief are not sufficient in *all* cases. The statute says, the killing must be 'absolutely necessary' to prevent it. The infliction of 'great bodily harm' upon another, may, or may not amount to a felony. So, an attempt to inflict it, may, or may not be a felony. If attempted with a deadly weapon, or with the intent to commit a felony, then the reasonable fear and actual belief would justify the killing. § 30. But when the attempt to inflict great bodily harm, does not constitute felony, there must exist the absolute necessity mentioned by the thirty-first section, to excuse the killing." *People v. Hurley*, 8 Cal., 390.

In order to render this construction of the California statute intelligible, it will be necessary to set out the three sections referred to. They are as follows:

"§ 29. Justifiable homicide is the killing of a human being in necessary self-defence, or in defence of habitation, property or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or against any person or persons who manifestly intend and endeavor, in a violent, riotous, or tumultuous manner, to enter the habitation of another for the purpose of assaulting or offering personal violence to any person dwelling or being therein.

“§ 30. A bare fear of any of these offences, to prevent which the homicide is alleged to have been committed, shall not be sufficient to justify the killing. It must appear that the circumstances were sufficient to excite the fears of a reasonable person, and that the party killing, really acted under the influence of these fears, and not in a spirit of revenge.

“§ 31. If a person kill another in self-defence, it must appear that the danger was so urgent and pressing that, in order to save his own life, or to prevent his receiving great bodily harm, the killing of the other was absolutely necessary; and it must appear also, that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline any further struggle before the mortal blow was given.” The construction thus put upon this statute, if not in itself questionable, is too refined for the comprehension of juries, and altogether too intricate to furnish a rule for the guidance of a person who is forcibly and perhaps suddenly assailed. To require a person under such circumstances to pause and debate in his mind whether, although the assailant manifestly intends to do him great bodily harm, such bodily harm, would or would not amount to a felony, is not only in itself absurd, but it effectually takes away the right of defence which the statute was intended to secure. Besides, the California statute exists substantially in Arkansas, Illinois, Georgia, Colorado and Dakota, and we are not aware of a similar construction being put upon it in any of those States or Territories. When we depart from the plain and simple rule declared in numerous American cases, that if the appearances are such as would convince a man of ordinary intelligence and firmness—or as some of the cases express it, a reasonable man—that the assailant intends to inflict death or great bodily harm, and that there is imminent danger of such design being accomplished, he may safely act upon these appearances and kill his assailant, provided he cannot otherwise escape the danger apparently impending; and that it is for the jury to determine whether such appearances existed; when we depart from this simple rule, we are all at sea, and the right of defence, instead of being a substantial right, becomes a snare and a mockery.

Instead of laying down intricate rules on the subject of excusable homicide, like that of the California case above cited, more than one able and upright judge has doubted whether any fixed rule upon the subject should be attempted. Thus, in Patten's case, *post*, we find the following language used by CHRISTIANCY, J.: “A correct idea of excusable homicide is not perhaps easily expressed by a brief abstract definition, without special reference to the facts of particular cases. We accordingly find the latter mode adopted in all the books. It has been thought safer to illustrate by particular instances, than to undertake to define, in advance, all the particular elements or combinations of facts which may render homicide excusable.” So, FISHER, J., in Cotton's case, *post*, after stating a hypothetical case, says: “It may be said that this is putting an extreme case. Grant it. It nevertheless serves the purpose for which it was intended, of showing the impropriety of laying down a rule, within the operation of which the Court declares that a person, without regard to the peculiar circumstances of the case, must bring his defence in order to be successful. Whether the danger must be immediate or unavoidable at the time of the killing, to justify the party in the act, must depend upon the facts and circumstances

of the case. This is the only general rule which a Court can, with any safety, lay down upon the subject. The jury must of necessity be the judges whether reasonable ground to apprehend the design contemplated by the law existed, and whether there was imminent danger, to all appearances, that such design would be executed. In arriving at their conclusion on this subject, they are expected to avail themselves of such knowledge as they possess in regard to human transactions, from their intercourse with society. The right of self-defence is not derived from the law. All that the law attempts to do on the subject is, to prescribe rules of caution and prudence, to be observed by persons before exercising the right, by ascertaining whether the danger exists, and whether it is imminent."

A similar view was taken by the Supreme Court of Tennessee in Jackson's case above quoted. The Court say: "It is difficult to lay down a rule strictly governing all cases, the circumstances of the cases differ so widely. The overt act that will justify a defendant in assuming that his own life is then in danger, must depend upon the circumstances of each particular case. Cases may be readily supposed, and no doubt in reality often occur, where, to require a defendant to wait until his adversary actually begins the combat, would be to require him to wait until there would be but little chance left of successful defence;—cases where the deadly purpose of the party is so fixed and determined, his character so reckless and bloody, his use of deadly weapons so expert and skillful, that to await his attack would be to await almost certain death; and the result of the encounter would often depend upon which party was the quicker in action. In cases of this character, where the parties meet, a very slight movement might justify either party in acting at once upon the assumption that his life is then in instant peril. Or cases might occur where the fact that the deceased met the defendant under the particular circumstances and in connection with previous facts, might show that the deceased sought the meeting with a deadly purpose, and be in it itself an overt act. These are doubtless extreme cases; but they are used to show that the *overt act* spoken of is a question depending upon the entire circumstances of each particular case; and also to illustrate the meaning of the expression that 'the danger must be imminent at the moment.' "

In a later case in California—*The People v. Williams*, 32 Cal., 280—error was assigned upon the refusal of the District Judge to charge as follows:

"If you believe that the defendant was in danger of being killed, or of receiving great bodily harm, at the hands of the deceased, and that the defendant understood such danger and feared it, then, in that case, he was justifiable in killing deceased; and in considering the question whether he was in danger, and whether he understood and feared such danger, you should consider and weigh the evidence in relation to the character of the deceased; also the evidence in regard to the threats of the deceased made against defendant; and, in fact, should consider every circumstance connected with the unfortunate altercation which ended in Eddy's death." The Supreme Court, SANDERSON J., delivering the opinion, said:

"This instruction was properly refused for two reasons: First, the rule upon the subject to which it was addressed, had already been stated by the Court in the precise language of the statute, which it is difficult to improve

(Act Concerning Crimes, §§ 30 and 31), [quoted at large, *supra*]; and, second, because it misrepresents the law. It makes the bare fear of the defendant, and not the fears of a reasonable person, under circumstances sufficient to excite them, the test of justification; and that, too, unaccompanied by the further and indispensable qualification that he acted under the influence of such fears, and not in a spirit of revenge."

In a case in Louisiana, the refusal of the District Judge to charge "that if the defendant believed that an assault was made upon her, by the deceased, under circumstances denoting an intention to take away her life or do her great bodily harm, and under that belief, at the time, she killed him, the killing was justifiable homicide,"—was urged as error. The Supreme Court, VOORHIES, J., delivering the opinion, said: "The District Judge properly declined giving the above instruction, the fallacy of which consists in making the mere belief of the accused that his life is threatened, a sufficient ground for taking the life of another. The Court below gave a correct exposition of the law in stating to the jury 'that if in the opinion of the jury, the deceased made an assault upon the accused, etc., from the nature of the assault the accused had reasonable ground to apprehend that there was a design to destroy her life, or commit some great bodily harm upon her person, and therefore, at the time the accused killed the deceased, the killing was excusable homicide.' See *State v. Chandler*, 5 La. An., 490." *State v. Swift*, 14 La. An., 827. And see *State v. Chopin*, 10 La. An., 458.

In *Gladden v. The State*, 12 Fla., 562, 575, an attempt was also made to set up the doctrine of *Grainger's case*. WESTCOTT, J., delivering the opinion of the Court, said:

"The second instruction asked and refused was: 'If you believe from the evidence that the prisoner killed the deceased through fear or cowardice, or under the belief that great bodily harm was about to be done, although there was no danger to his life or great bodily harm, it will be a justifiable killing, and you will acquit.'

"This instruction is based on the doctrine enunciated in the case of *Grainger v. The State*, 5 Yerg., 459, and is in effect that the act is justified, if the prisoner killed the deceased under the belief that great bodily harm was about to be done, although there was no such danger.

"The facts in these cases are certainly very different. In *Grainger v. The State*, the Court say: 'Grainger used all the means in his power to escape from an overbearing bully. He shot only to protect himself from threatened violence, and that great. He behaved like a timid and cowardly man, was much alarmed, and was cut off from the chances of probable assistance.' Here, at the time of the killing, Gladden was on horseback, several yards off, with a gun in his hand, and his victim, without any like weapon, in no position to strike, or even to defend himself.

"Independent of the facts, however, every person is presumed to be sane, and the law holds him responsible for reasonable deductions, and when we cease to hold him responsible to such an extent, we are in a labyrinth of never-ending uncertainty.

"The belief must be reasonable; there must be reasonable ground to apprehend a design to take away life, or to do great bodily harm, and reasonable ground for believing the danger imminent that such design will be accomplished then."

In a case in Missouri, the following instruction was held properly refused, but no reasons are given for so holding: "If the jury believe that defendant had cause to believe that his life was in danger, or that great bodily harm was about to be inflicted by the deceased, and acted under that belief at the time, the law is for the defendant, if the jury believe that defendant acted under the belief at the time, and that he stabbed Howel in order to save his own life." *State v. O'Connor*, 31 Mo., 389.

In *The People v. Austin*, 1 Parker C. R., 154, the prisoner was indicted with one Nesbitt, for the murder of Timothy Shea, on the 28th of September, 1848, by firing a pistol at him. Trial was had in the New York Oyer and Terminer, before EDMONDS, Justice of the Supreme Court, and Aldermen STEVENS and DODGE.

The evidence went to show, that on the evening in question, the prisoner, with three of his companions, sallied out into the streets on a frolic, and after visiting five or six drinking houses, entered one in Leonard street, next door to the residence of the deceased, and on coming out, passed the door of the basement occupied by the deceased's mother as a porter house, and in which the deceased, two of his brothers and a sailor, were engaged in carousing. As Austin was passing the door, one of the inmates came out, and invited him to go in and hear the singing, which he refused to do. After refusing repeated invitations, he was taken by the collar and dragged into the basement. The door was then shut upon him, and he was repeatedly urged to sing or to drink, but he refused. One of his companions, the other defendant, Nesbitt, followed him into the basement, and attempted to fasten the door open. A row then began, a conflict, in the course of which Nesbitt fled from the room, and the brother of the deceased threw a tumbler and pitcher at Austin, and struck him a severe blow on the forehead with a decanter. Austin retreated from the basement; he was followed by the sailor, and struck a blow with a chair. About this time, but whether before or after the blow with the chair, was not ascertained, some one fired twice into the basement, with a six-barreled revolving pistol. One of the balls took effect on the deceased, who was then advancing with a chair uplifted towards the door through which Austin had retreated, and who died almost immediately. After the firing, the prisoner retreated towards the police station-house, distant about one hundred feet from the scene of the affray, and on the way over which he had passed, the pistol was afterwards found. He was severely wounded, and did not recover for some weeks.

D. Graham, for the prisoner, made (among others) the following point: "If the defendant, though in no great danger of serious bodily harm, *through fear, alarm or cowardice*, discharged the pistol at the deceased, or into the basement, under the impression that great bodily injury was about to be inflicted upon him, it is not an offence."

But EDMONDS, J., in charging the jury, said:

"The homicide would be justifiable under our law, only in case it was committed by the prisoner when there was *reasonable ground* to apprehend a design to do him some great personal injury, and there was imminent danger of such design being accomplished. But of this, the jury were to be the judges, not the prisoner, and it was for them to say, from all the circumstances proved before them, whether there was reasonable ground for

such apprehension, and whether there was, at the moment the fatal shot was fired, imminent danger that some great personal injury would be done to the prisoner."

It is to be observed, however, that the law is not to be understood precisely as this charge of Judge EDMONDS would imply; for the danger need not be in point of fact, imminent, but it will be sufficient if the danger appear to be imminent to the comprehension of a reasonable man. See Sullivan's case, *ante*, p. 65; Shorter's case, *post*.

In a case determined by the Supreme Court of North Carolina, in 1864, the question in the principal case was presented for determination. The case was an indictment for assault and battery. The State offered evidence tending to show that the defendant met the prosecutor in the street, and knocked him down with his walking cane, without provocation. The defendant offered evidence tending to show that at the time he struck the prosecutor, the latter had a knife in his hand, held up in a striking position at a distance of four or six feet from the defendant. The refusal of the Court to charge that "if defendant, at the time he struck Gash, [the prosecutor], believed Gash was about to strike him with the knife, then the defendant had the right to strike Gash first;"—was assigned as error.

MANLY, J., speaking for the Court, said: "A right to act in self-defence does not depend upon the special state of mind of the subject of the enquiry. He is judged by the rules which are applicable to men whose nerves are in an ordinarily sound and healthy state; and whatever may be his personal apprehensions, if he has not reasonable ground to support them, he will not be protected by the principle of self-defence. The normal condition of the human passions and faculties must be regarded in establishing rules for the government of human conduct. The question, then, in such cases as the present, is not what were the apprehensions of the defendant, but what these ought to have been, when measured by a standard derived from observation of men of ordinary firmness and reflection. This is what is called reasonable ground of belief, and is the rule for judging of a case of self-defence, upon an indictment for an assault and battery. Therefore, a prayer for instructions, which assumed that one's personal feelings and apprehensions, however eccentric and morbid these might be, determined the character of his conduct, was properly refused." *State v. Bryson*, 1 Winston's Law Reports, part 2, p. 86.

As an illustration of the extravagant lengths to which the doctrine of Grainger's case, if admitted, would lead, we may quote the case of *The State v. Shoultz*, 25 Mo., 128, 149. The testimony in that case exhibited a case of deliberate and cold-blooded murder. The defendant was convicted of murder in the first degree. Among the errors assigned in the Supreme Court was the refusal of the Court below to permit the prisoner to introduce evidence, to show that by reason of his weak and crippled condition of body, he was peculiarly sensitive to fear from external violence. Now if the fears of a coward would excuse the killing of a man, nothing would seem to be more reasonable than to permit the slayer to prove on his trial, that, by reason of some peculiar physical or mental infirmity, he was a coward. And had the Court admitted the doctrine of Grainger's case, its conclusion would doubtless have been different from what it was.

RYLAND, J., speaking for the Court, said:

“The defendant proposed to give in evidence his own peculiar sensitiveness to fear from external force, owing to his condition of body. This the Court refused, and we think very properly. Wharton, in his treatise on homicide lays it down as a general rule that there cannot be an acquittal, unless there is reasonable evidence of an intent on the part of the deceased to commit some felonious act. This evidence must be gauged by the defendant's opportunities at the time; and if he have reasonable grounds to believe a felony intended, it makes no matter that such was not reasonably the case. Thus, if a man assaults another with a pistol in such a manner as to produce the belief that he is about to take life, it makes no matter whether the pistol be loaded or not (Whart. on Hom., 215.) When, from the nature of the attack, there is reasonable ground to believe that there is a design to destroy his life or to commit any felony upon his person, the killing the assailant will be excusable homicide, although it should afterwards appear that no felony was intended. Wharton says: ‘It is manifest that very embarrassing questions will here arise as to whether the test to be applied is the defendant's capacity, or the capacity of the jury trying the case. If the latter be the case, the question will be of comparatively easy solution. It will be only for the jury to examine the *res gestæ*, and determine whether, from them, a reasonable belief of an intended felony can be deduced. But if the defendant's capacity is to be taken as the stand point, the enquiry is widely extended. In the first place, it involves the temperament, nervous and intellectual, at least, of the defendant, as well as his means of physical resistance. In the second place, it involves the same qualities in the deceased, so far as they could have been supposed to have been known to the defendant at the collision. For, adopting this point of view, it would be absurd to say that a child or imbecile person would not have much greater reason to apprehend a felonious assault from an incensed lunatic, who was starting towards him with the appearance of an assailant, than would the lunatic from the attack of the imbecile or child. And if we admit a distinction in this case, it would be difficult to refuse to receive evidence of the nervous and physical texture of the defendant in all other cases. It is clear, however, that to do so, would be to yield a very dangerous latitude in the trial of a case, which would not only require a departure from the established common law principle, that the deceased's character cannot be brought into controversy, but would open a number of side issues.’ (Whart. on Hom., 215.) ‘But no danger can be supposed to flow from this principle, when it is considered that the jury who try the case, and not the party killing, are to judge of the reasonable grounds of his apprehension.’ Such was the language of Justice PARKER in his charge to the jury in Thomas O. Selfridge's case. [*Ante*, p. 18.] From a careful consideration of this point, after a patient examination of numerous authorities, both in England and in this country, we come to the conclusion that the Court below very properly refused to admit the evidence of the defendant, that by reason of his weak and crippled condition of body, he was rendered nervous and peculiarly sensitive to fear from external violence.”

That the question whether the appearances of danger upon which a person acted were sufficient to justify him in resorting to the measures of defence he did, is one of fact for the jury, there can be no doubt. Selfridge's case, *ante*, p. 18; Wiltberger's case, *ante*, p. 39; Harris' case, *post*;

Oliver's case, *post*; McLeod's case, *post*. And if any doubt could remain, in view of the cases already examined in this note, and particularly Shoultz's case, *supra*, as to the embarrassing questions to which Dr. Wharton alludes in the language above quoted, namely, whether the defendant's justification is to be tested by his own capacity, or by the capacity of the jury before whom he must make that justification clear, it would seem to be resolved in Harris' case, *post*, where the Court say: "The prisoner says, he believed his life was in danger. Who can look into his heart? If the law allows him to judge, who can contradict him? The circumstances are nothing. It is his belief that justifies him. The law is not so. It is only from circumstances accompanying the transaction, that reasonable ground can be ascertained, and of their bearing and influence the jury are the sole judges." Still, the Court in Harris' case, may not have had in their minds the distinction taken by Dr. Wharton, and may have meant to decide nothing more than that the jury are in all cases to be the judges of the apparent necessity under which the slayer acted, where it is alleged that the killing was in self-defence,—a proposition which no one can doubt—without determining whether their judgment is to be founded upon the strength of an ordinary man, or upon the defendant's peculiar infirmities. Nevertheless the question seems to be so thoroughly put to rest by the cases examined in this note, as well as by Creek's case, *post*, and those which immediately follow it, as to admit of no further discussion. But the same doubt still remains in Dr. Wharton's mind, and he expresses it in the last edition of his Criminal Law, in the following language: "So it has been frequently laid down that such fears should be reasonable to constitute a defence. But it is submitted that while this is undoubtedly true where such fears are *voluntarily and conscientiously unreal*, yet it is otherwise when the defendant honestly entertains them, though they may be in fact unfounded. In such case, a morbid condition of brain or nerves is admissible to prove the reality of such fears, as is derangement to prove the reality of an hallucination. In accordance with this principle, in a case tried in Philadelphia in 1846, where the defendant, during the Kensington Irish and Native American riots, killed an innocent person, under the alleged belief that she was one of a party seeking his life, the defence was permitted to set up the extreme nervous excitement and tension, producing a belief in a constant conspiracy to take his life. Flavel's case, MSS. This does not differ much from Levett's case, already quoted." Whart. Crim. Law, 6th edition, § 1027.

With deference to the learned author, we think the case differs much from Levett's case, Cro. Car., 538. Levett, aroused in the night by an alarm of burglars, seized a rapier, and ran into his buttery to search for a supposed burglar whom his wife had discovered there; and, thrusting forward *in the dark*, killed an innocent person whom the maid-servant had secreted there. It was entirely probable to a reasonable man, from all the circumstances surrounding Levett, that the person in the buttery was a burglar, and he had no reason whatever for supposing that an innocent person was secreted there, it being about twelve o'clock at night. No jury in the United States, under proper instructions, would have hesitated a moment about acquitting Levett; nor would it be in the least degree necessary, in order to assure the acquittal of a defendant in such a case, to show that he acted

under hallucinations or morbid fears, superinduced by some peculiar nervous tension, or other physical or mental infirmity. Levett did no more than any other reasonable man was liable to do, making due use of his faculties in such an extreme emergency. He who is obliged to search for a thief in his house in the night time, is in a position of extreme peril, as it not unfrequently happens that burglars in such cases, kill the inmates of the house in order to effect their escape. Courts and juries will not hold a person who unfortunately kills another, under such circumstances, to a nice degree of accountability.

With regard to Flavel's case, cited by Dr. Wharton, as above stated, it may be doubted whether a similar ruling by a respectable Court can elsewhere be found. Precisely the reverse in principle is the ruling in Shoultz's case, *supra*; and also the ruling made in *The State v. Anderson*, 4 Nevada, 265, 275. In this last case, an attempt was made to prove that the defendant had been in difficulties, and was in a state of mental excitement just prior to the killing, arising from difficulties or quarrels with other persons than the deceased. BEATTY, Ch. J., delivering the opinion of the Supreme Court, said: "We think this testimony was properly refused. It had no connection with the case. If the defendant had quarrelled with anybody else, we cannot see how that could mitigate his offence in killing Slocum."

Dr. Wharton cites Logue's case, *post*, as being to the same effect as Flavel's on the point in question. We have searched Logue's case in vain for any such conclusion. The very reverse is there decided. The learned Judge who delivered the opinion in that case, said: "I take the rule to be settled, that the killing of one who is an assailant, must be under a *reasonable* apprehension of loss of life or great bodily harm, and the danger must appear so imminent at the moment of the assault, as to present no alternative of escaping its consequences but by resistance. Then the killing may be excusable, even if it turn out afterwards that there was no actual danger."

Dr. Wharton concludes his observations on this point by quoting the language of Baron PARKE, in *Reg. v. Thurborn*, 1 Den. C.C., 388-9, that "the rule of law founded in justice and reason is, that *actus non facit reum, nisi mens sit rea*; the guilt of the accused must depend upon the circumstances as they appear to him." This language of Baron PARKE has been quoted in Pond's case, *post*, and it is there said that Mr. Bishop has expressed the same rule very clearly by declaring that "in all cases where a party *without fault or carelessness, is misled concerning facts*, and acts as he would be justified in doing if the facts were what he believed them to be, he is legally, as he is morally, innocent. 1 Bish. Cr. Law, § 242." [5th ed. § 303.] And the Court in Pond's case, very justly say, that "the law, while it will not generally excuse mistakes of law (because every man is bound to know that), does not hold men responsible for a knowledge of facts, *unless their ignorance arises from fault or negligence*." In Neeley's case, *ante*, p. 101, the Court say: "The general proposition, with proper explanations and qualifications, as stated by Baron PARKE (*Reg. v. Thurborn*, 1 Den. C. C., 387), that 'the guilt of the prisoner must depend on the circumstances as they appear to him,' is not by any means denied." And although the above language of Baron PARKE was used in a case of larceny,

where the defendant had found a bank bill in the road without knowing who was the owner, and where the enquiry consequently was, whether the *animus furandi* necessary to constitute larceny existed: yet, the general principle stated will probably not be questioned anywhere; and the maxim, *actus non facit reum, nisi mens sit rea*—the act does not make the actor guilty, unless the intention be also guilty—is, perhaps, as nearly of universal application as any other maxim of the law; and it is possible that the doubt which Dr. Wharton expresses, notwithstanding the contrary seems so firmly settled by a multitude of adjudications, points to one of the debatable questions of the future.

CREEK v. THE STATE.

[24 IND., 151.]

Supreme Court of Indiana, May Term, 1865.

JOHN T. ELLIOTT, JAMES S. FRAZER, ROBERT C. GREGORY, CHARLES A. RAY,	}	<i>Judges.</i>
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**THREATENING ACTIONS—MANSLAUGHTER DEFINED—REASONABLE FEARS—
OVERRULES GRAINGER'S CASE, ANTE.**

1. On the trial of an indictment for murder in the second degree, the Court instructed the jury that no "threatening actions" of the deceased could justify the defendant in taking his life, and, in another instruction, told them that if the deceased made a violent assault upon the defendant while he was retreating, and the deceased pursued him, and the defendant had reasonable apprehension of great bodily harm and had used all reasonable means to keep out of the way, he would be justified in repelling the assault, and if, in so doing, death resulted, he ought to be acquitted. Held, that neither instruction correctly stated the law. The latter was erroneous, because retreat is not always a condition which must precede the exercise of the right of self-defence.

2. In manslaughter, the killing, if upon a sudden heat, must be *voluntarily* done without malice.

3. To justify the killing of another on the ground of fear of great bodily harm, there must be reasonable cause for such fear, and it is not sufficient to show that the defendant was in actual fear.

4. The criminal law while indulging to a humane extent the mere in-

firmities of human nature, nevertheless requires of sane men the exercise of a mastery over their fears, as well as their passions.

Appeal from the Fayette Circuit Court.

FRAZER, J., delivered the opinion of the Court.

This was an indictment for murder in the second degree. There was a conviction for manslaughter.

The Court instructed the jury that no "threatening actions" of the deceased could justify the defendant in taking his life. In a separate charge, the Court also told the jury, that if the deceased made a violent assault upon the defendant, while he was retreating, and the deceased was pursuing him, and the defendant had reasonable apprehensions of great bodily harm, and had used all reasonable means to keep out of the way, he would be justifiable in repelling the assault, and if, in so doing, the death of the deceased was produced, the defendant ought to be acquitted.

It is not possible to reconcile these two instructions. In one, the jury was, in effect, told that no threatening actions could have warranted the defendant in taking the life of the deceased; while in the other, they were told that certain menaces would warrant it, provided that the defendant had been retreating, and the deceased pursuing him. Even the latter does not give the law accurately. Retreat may be impossible or perilous, and is not, therefore, always a condition which must precede the right of self-defence. The law upon the subject is so accurately laid down in the text-books, that it seems to us unnecessary to discuss it further. The first instruction to which we have alluded was given on motion of the prosecuting attorney. It is so very much at variance with all that is settled upon the subject, that we need not prolong this opinion by dwelling upon it.

In the fourth instruction, given by the Court upon its own motion, after setting forth an accurate definition of manslaughter, as the statute defines it, it is added, "and if the defendant killed the deceased upon a sudden heat, with an ax, as charged in the indictment, you can find the defendant guilty of manslaughter." This is inaccu-

rate. The killing must have been *voluntarily* done, upon a sudden heat, if without malice, to make it manslaughter.

The defendant moved the Court to give sundry instructions to the jury, which were refused; by which the question is raised, whether the actual *fear*, by the defendant, of great bodily harm from the deceased, would be sufficient to excuse the homicide, or whether there must be a *reasonable cause* for such fear.

This question is one concerning which much may be said on both sides that is plausible and difficult to answer. It has been somewhat discussed by judicial tribunals, from time to time, as they have been compelled to pass upon it, and it seems to us that much that has been said upon it is more metaphysical than practical, and that often the theory of existing law has been lost sight of in the nicety of abstract disquisition. We are not disposed to enter at much length into the subject.

It ought to borne in mind, that the criminal law holds sane men responsible for the ordinary exercise of their reason. It is a power common alike to cowards and those who know no fear. It is a guide to which both may apply if they wish to do so. By the power of will, he who is naturally very timid can, and often does, meet danger with as much self-possession as the boldest man, and even his fears beget that caution which is a necessary safe-guard against rashness. Of all men, he is probably least likely to commit needless homicide in self-defence, for his unfortunate weakness usually tends to paralyze his arm, and makes him slow to strike, quite as much as it subjects him to the torture of groundless apprehension. Of course we speak of persons not so unmanned by fear as to be incapable of exercising either judgment or will. A sane man is so constituted that he can be either the master or the slave of his fears, as well as his passions. The criminal law, indulging to a humane extent the mere infirmities of human nature, nevertheless requires the exercise of this mastery. Accordingly the great weight of authority is against the

doctrine urged by the appellant's counsel. We believe it has met the approval of the Supreme Court of Tennessee only. *Shorter v. The People*,^a 2 Comst., 197; *Stewart v. The State*^b, 1 Ohio (McCook), 71.

* * * * *

Judgment reversed.

SHORTER V. THE PEOPLE.

[2 Comst., 193.]

Court of Appeals of New York, May Term, 1849.

FREEBORN G. JEWETT, GREENE C. BRONSON, CHARLES H. RUGGLES, ADDISON GARDINER,	}	<i>Judges.</i>
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SAMUEL JONES, WILLIAM B. WRIGHT, THOMAS A. JOHNSON, CHARLES GRAY,	}	<i>Justices of the Supreme Court and ex-officio Judges.</i>
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REASONABLE FEAR OF DEATH OR GREAT BODILY HARM EXCUSES THE SLAYER—MUTUAL COMBAT—KILLING WITH DANGEROUS WEAPON—IRRELEVANT INSTRUCTION, THOUGH ERRONEOUS, NO GROUND OF REVERSAL.

1. One who is without fault himself, when attacked by another, may kill his assailant, if the circumstances be such as to furnish reasonable ground for apprehending a design to take away his life or do him some great bodily harm, and there is also reasonable ground for believing the danger imminent that such design will be accomplished; although it may afterwards turn out that the appearances were false, and there was, in fact, no such design nor any danger that it would be accomplished. The revised statutes of New York (2 R. S., 660, § 3, sub. 2) have not changed the law on this subject. [Acc. Selfridge's case, *ante*, p. 18; Neeley's case, *ante*, p. 101; note to Grainger's case, *ante*, p. 242; Sullivan's case, *ante*, p. 65; Logue's case, *post*, and cases following it; Pond's case, *post*.]

2. When a man is struck with the naked hand, and has no reason to apprehend a design to do him any great bodily harm, he must not return

^a *Post*, next case. ^b *Ante*, p. 191.

the blow with a dangerous weapon. After a conflict has commenced, he must quit it, if he can do so in safety before he kills his adversary; and if his adversary try to escape, he must not pursue, and give him fatal blows with a deadly weapon. [Acc. Scott's case, *ante*, p. 163; and as to retreating, note to Selfridge's case, *ante*, p. 28; and note to James D. Kennedy's case, *ante*, p. 139.]

3. Where the facts of a case do not require a charge upon the law of justifiable homicide, an error committed in such an instruction will not be ground for reversing a judgment of conviction. [Acc. MORGAN, J., in Lamb's case, *post*; Evans' case, *post*; Shippey's case, *ante*, p. 137; Harrison's case, *ante*, p. 71.]

Henry Shorter, a negro, was indicted for the murder of Stephen C. Brush, and tried at the Erie county Oyer and Terminer, in November, 1848. It was proved on the trial that on the 19th day of September, 1848, at about eleven o'clock in the evening, the deceased was passing down Seneca street, in the city of Buffalo, in company with some boys from fifteen to seventeen years of age; that they were conversing and laughing about a negro character that had been acted that evening at the theatre; and that they passed the prisoner and another negro on the side-walk. The prisoner and the other negro walked behind for a few rods, and then came up with them, and the prisoner passed between the deceased and the boys, and as he passed a fight occurred between the deceased and the prisoner. One of the witnesses thought that the deceased had the best of the fight at first. None of the other persons interfered. After several blows had passed, the deceased hallooed, "he has got a knife," and he then retreated to the middle of the road. The prisoner followed him and blows were passing between them, or else the prisoner was striking the deceased and the deceased defending against the blows, until he got to the middle of the road, when he fell down and died in about fifteen minutes. When he fell the prisoner and the other negro ran away.

The evidence tended to show that the prisoner carried with him on the occasion a large dirk knife, with which he inflicted on the deceased nine or ten severe wounds, one of which entered the cavity of the heart and was mortal. One was also in the lungs and several were on

the back of the neck. It also appeared that when the deceased and the boys passed the prisoner, some words occurred between them. The witnesses did not agree as to what the precise words were, but the evidence tended to show that the prisoner said as the deceased passed, "what about negroes?" The persons in company with the deceased testified, that the prisoner struck the first blow; but the other negro testified that the first blow was struck by the deceased. There was no evidence of any previous acquaintance between them.

The evidence having closed, Justice HOYT presiding at the trial, proceeded to charge the jury at large upon the case; and having done so, the counsel for the prisoner requested the Court to charge, that if the deceased struck the first blow, and if there was reasonable ground to apprehend a design on the part of the deceased to do the prisoner some great personal injury, and the prisoner believed that there was imminent danger of such design being accomplished, it was a case of justifiable homicide, although he might be mistaken in such belief; and that the question was not whether such danger existed, but whether the prisoner believed it to exist. The Court refused so to charge, but on the contrary charged that to render the killing justifiable, the jury should be satisfied that there was in fact imminent danger that the deceased would commit some great personal injury upon the prisoner. The prisoner's counsel excepted to this part of the charge and to the refusal to charge as requested. The jury found the prisoner guilty of murder. A bill of exceptions was made and the case removed by certiorari into the Supreme Court, where a new trial was refused.

The prisoner brought error to this Court.

Eli Cook, for the plaintiff in error; *B. H. Austin*, District Attorney, for the people.

BRONSON, J. delivered the opinion of the Court:

When one who is without fault himself, is attacked by another in such a manner, or under such circumstances as to furnish reasonable grounds for apprehending a design to take away his life, or to do him some great bodily

harm, and there is reasonable ground for believing the danger imminent that such design will be accomplished, I think he may safely act upon appearances, and kill the assailant, if that be necessary to avoid the apprehended danger; and the killing will be justifiable, although it may afterwards turn out that the appearances were false, and there was *in fact* neither design to do him serious injury, nor danger that it would be done. He must decide, at his peril, upon the force of the circumstances in which he is placed; for that is a matter which will be subject to judicial review. But he will not act at the peril of making that guilt, if appearances prove false, which would be innocence, had they proved true. I cannot better illustrate my meaning than by taking the case put by Judge, afterwards Chief Justice PARKER, of Massachusetts, on the trial of Thomas O. Selfridge*. "A., in the peaceable pursuit of his affairs, sees B. walking rapidly towards him with an outstretched arm and a pistol in his hand, and using violent menaces against his life as he advances. Having approached near enough in the same attitude, A., who has a club in his hand, strikes B. over the head, before, or at the instant the pistol is discharged; and of the wound B. dies. It turns out that the pistol was loaded with powder only, and that the real design of B. was only to terrify A." Upon this case, the judge inquires, "will any reasonable man say that A. is more criminal than he would have been if there had been a bullet in the pistol? Those who hold such doctrines must require, that a man so attacked must, before he strikes the assailant, stop and ascertain how the pistol was loaded—a doctrine which would entirely take away the right of self-defence. And when it is considered that the jury who try the cause, and not the party killing, are to judge of the reasonable grounds of his apprehension, no danger can be supposed to flow from this principle." The judge had before instructed the jury, that, "when, from the nature of the attack, there is reasonable ground to believe that there is a design to

destroy his life, or commit any felony upon his person, the killing of the assailant will be excusable homicide, although it should afterwards appear that no felony was intended." Selfridge's trial, p. 160^b. 1 Russ. on Crimes, 699, ed. of '24; p. 485, note, ed. of '36. To this doctrine I fully subscribe. A different rule would lay too heavy a burden upon poor humanity.

I have stated the case of Selfridge the more fully, because it is not only an authority in point, but it is one which the revisers professed to follow in framing our statute touching this question. I shall not stop to consider the common law distinction, between justifiable and excusable homicide, because our statute has placed killing in self-defence under the head of justifiable homicide. 2 R. S., 660, §3.

The Massachusetts case lays down no new doctrine. The same principle was acted on in Levett's case, recited by JONES, J., in Cook's case, Cro. Car., 538, to the following effect: Levett was in bed with his wife, and asleep, in the night, when the servant ran to them in fear, and told them that thieves were breaking open the house. He arose suddenly, and taking a drawn rapier in his hand, went down and was searching the entry for the thieves, when his wife espying some one whom she knew not in the buttery, cried out to her husband, in great fear, "here they be that would undo us." Levett thereupon hastily entered the buttery in the dark, not knowing who was there, and thrusting with his rapier before him, killed Frances Freeman, who was lawfully in the house and wholly without fault. On these facts, found by special verdict, the court held that it was not even a case of manslaughter, and the defendant was wholly acquitted. Now here, the defendant acted upon information and appearances which were wholly false; and yet as he had reasonable grounds for believing them true, he was held guiltless. Foster, (Crown Law, p. 299,) says of this case, "possibly it might have been better ruled manslaughter at common law, due circumspection not

^b *Ante*, p. 18.

having been used." I do not understand him as questioning the principle of the decision, but as only expressing a doubt whether the principle was properly applied. He calls it nothing more than a case of manslaughter, when, if a man may not act upon appearances, it was a plain case of murder. So far as I have observed, no other writer upon criminal law has questioned, in any degree, the decision in Levett's case; and most of them have fully approved it. East, in his *Pleas of the Crown*, vol. 1, p. 274, 275, has done so. Hale, (1 P. C., 42, 474,) mentions it among cases where ignorance of the fact will excuse from all blame. Hawkins (1 P. C., 84, Curwood's ed.,) says the killing had not the appearance of a fault. Russell (on crimes, vol. 1, p. 550, ed. of 1836,) approves the decision, which he introduces with the remark that "important considerations will arise in cases of this kind, [he was speaking of homicide in defence of one's person, habitation or property,] as to the grounds which the party killing had for supposing that the person slain had a felonious design against him; more especially where it afterwards appears that no such design existed. Roscoe (Crim. Ev., p. 639,) says, "It is not essential that an actual felony should be about to be committed, in order to justify the killing. If the circumstances are such as that, after all reasonable caution, the party suspects that the felony is about to be immediately committed, he will be justified." And he then gives Levett's case as an example.

The case of Sir William Hawkesworth, who, through his own fault, was shot by the keeper of his park, who took him for a stranger who had come to destroy the deer, went upon the same principle. 1 Hale P. C., 40; 1 East P. C., 275; 1 Russ. on Cr., 549. Other cases are put in the books, where the killing will be justified by appearances, though they afterwards prove false. A general, to try the vigilance or courage of his sentinel, comes upon the sentinel in the night in the posture of an enemy, and is killed. There the ignorance of the sentinel that it was his general and not an enemy, will

justify the killing. 1 Hale P. C., 42; 1 East P. C., 275; 1 Russ., 540. The case mentioned by Lord Hale, which was before him at Peterborough, where a servant killed his master, supposing he was shooting at deer in the corn, in obedience to his master's orders, belongs to the same class. 1 Hale P. C., 40, 476; 1 Russ., 540. In Rampton's case, Kelyng Rep., 41, the defendant killed his wife with a pistol which he had found in the street, after ascertaining, as he had supposed, by a trial with the ramrod, that it was not loaded, though in fact it was charged with two bullets. This was adjudged to be manslaughter, and not merely misadventure. Foster (Crown Law, 263-4,) calls this a hard case, and thinks the man should have been wholly acquitted, on the ground that he exercised due caution—the utmost caution not being necessary in such cases. But if the decision was right, as I am inclined to think it was, for the want of proper caution, still the case goes on the ground that the degree of guilt may be affected by appearances which afterwards prove false; for if he had not tried the pistol, it would have been murder. Foster, (p. 265,) mentions a case which was tried before him, where the prisoner had shot his wife with a gun, which he supposed was not loaded. The judge being of opinion that the prisoner had reasonable ground to believe that the gun was not loaded, directed the jury, that if they were of the same opinion, they should acquit the prisoner; and he was acquitted. In Meade's case,^c 1 Lewin's Cr. Cas., 184, the prisoner had killed with a pistol one of a great number of persons who came about his house in the night time, singing songs of menace, and using violent language. HOLROYD, J., told the jury, that if there was nothing but the song, and no *appearance* of violence—if they believed there was no *reasonable ground* for apprehending danger, the killing was murder. And in *The People v. Rector*,^d 19 Wend., 569, COWEN, J., said, alarm on the part of the prisoner, *on apparent, though unreal* grounds, was pertinent to

^c Post. ^d Post.

the issue. In *The United States v. Wiltberger*,^o 3 Wash. C. C., 515, 521, the Judge told the jury, that for the purpose of justifying the killing, the intent of the deceased to commit a felony must be *apparent*, which would be sufficient, although it should afterwards turn out that the real intention was less criminal, or even innocent. He afterwards added, that the danger must be imminent, meaning undoubtedly, that it must wear that appearance. *The State v. Wells*,ⁱ 1 Cox N. J. Rep., 424, is entirely consistent with this doctrine. The Supreme Court of Tennessee has gone still farther, and held that one who kills another, believing himself in danger of great bodily harm, will be justified, although he acted from cowardice, and without any sufficient ground in the appearances, for the killing. *Grainger v. The State*,^s 5 Yerger, 459. This was, I think, going too far. It is not enough that the party believed himself in danger, unless the facts and circumstances were such that the jury can say he had reasonable grounds for his belief.

We have been referred to two cases where it was said, in substance, that the killing must be necessary. *Regina v. Smith*,^h 8 Car. and Pay., 160, and *Regina v. Bull*,ⁱ 9 Ib., 22. The life of a human being must not be taken upon slight grounds; there must be a necessity either actual or apparent, for the killing, or it cannot be justified. That, I think, is all that was meant by such remarks as I have mentioned. The unqualified language that the killing must be necessary, has, I think, never been used when attention was directed to the question whether the accused might not safely act upon the facts and circumstances, as they were presented at the time. I have met with no authority for saying that a homicide which would be justifiable, had appearances proved true, will be criminal when they prove false.

But it is said that our statute has changed the rule of the common law on this subject, and that there must, *in fact*, be danger of great bodily harm, or the killing cannot be justified. We know that such a change was

^o *Ante*, p. 34. ⁱ *Ante*, p. 145. ^s *Ante*, p. 238. ^h *Ante*, p. 130. ⁱ *Post*.

not intended by the revisers, for they said in their notes, that the provision was "according to the views of most of the writers on the subject, and the express decisions in Massachusetts and New Jersey." Those writers and decisions have already been noticed. As I read the statute, it affirms the rule of the common law. The words are, homicide in self-defence is justifiable "when there shall be a *reasonable ground to apprehend* a design to commit a felony, or to do some great personal injury, and there shall be *imminent danger* of such design being accomplished." 2 R. S., 660, §3, sub. 2. The words "imminent danger" in the last branch of the clause, do not mean, as the argument for the prisoner assumes, that there must in fact be an impending evil which is ready to fall; but only that there is a threatened evil, or one which appears as if it were ready to fall. There must be reasonable ground to apprehend a wicked design and apparent danger, that such design will be accomplished. It is enough, by the express words of the statute, that there is reasonable ground to apprehend a wicked design; and it is absurd to suppose that such a provision was immediately followed by another, that the danger of the apprehended design being accomplished must be actual, and not merely apparent. Such a construction would make the latter part of the clause nullify the first; for if there must be actual danger that the design will be accomplished, there must of necessity be an actual design to be accomplished.

Although I cannot concur in the law of that part of the charge to which exception was taken on the trial, it does not necessarily follow that we must reverse the judgment. The evidence did not make a case for laying down the law of justifiable homicide; and an error of the Court concerning an abstract proposition, having nothing to do with the matter in hand, is not a sufficient ground for reversing a judgment. If every controverted fact mentioned in the bill of exceptions is taken in favor of the prisoner, the best case which he can possibly make will be substantially as follows: There was a

sudden combat between the parties in the night, in which the deceased gave the first blow ; but the prisoner entered readily into the fight. The deceased had no weapon, and gave blows with his naked hands or fists, while the prisoner struck with a knife, inflicting not less than nine wounds, one or more of which were mortal. After several blows had passed, the deceased hallooed, "he has got a knife," and retreated towards the middle of the street. The prisoner followed, and continued to give blows ; the deceased at the same time either giving blows or defending himself against those given by the prisoner. The prisoner did not leave the sidewalk. When the deceased got to the middle of the road, he cried out, "Oh, boys," fell, and died in a few minutes. The prisoner did nothing to shun the combat, nor did he show any disposition to stop the fight after it had commenced. Although one witness thought the deceased had the best of the fight at first, no important advantage was gained over the prisoner ; he was neither knocked down, nor seriously injured, nor was he in any danger of life or limb. He followed when the deceased tried to escape, still giving blows with a deadly weapon until very near the moment when the deceased fell down and expired. This is the most favorable statement of the case for the prisoner which can be drawn from the facts detailed in the bill of exceptions ; and much more favorable than any intelligent jury would draw from the whole of the evidence. But taking the case as I have stated it, there is no color for calling it justifiable homicide, or for leaving any such question to the jury. If it was not murder, it was manslaughter at the least ; and so far as relates to these offences, no exception was taken to the charge. When a man is struck with the naked hand, and has no reason to apprehend a design to do him any great bodily harm, he must not return the blow with a dangerous weapon. After a conflict has commenced he must quit it, if he can do so in safety, before he kills his adversary ; and I hardly need add, that if his adversary try to escape, he must not pur-

sue, and give him fatal blows with a deadly weapon.

As there was no question of justifiable homicide in the case, the prisoner had no right to call on the Court to instruct the jury on that subject; and, although the instruction given was wrong in point of law, I do not see how it can possibly have operated to the prejudice of the prisoner. As this is a criminal and a capital case, I cannot but feel a strong disposition to give the prisoner a new trial. But the law concerning bills of exceptions, is the same in criminal as it is in civil cases; *The People v. Wiley*, 3 Hill, 194, 214; and, we must not allow our feelings to draw us into the making up of a bad precedent. I am of opinion that the judgment of the Supreme Court should be affirmed; and my brethren concur in this opinion, upon both the points which have been considered.

Judgment affirmed.

NOTE.—The opinion of the Supreme Court in this case will be found reported in 4th Barbour, 460. In reviewing the case in that Court, MARVIN, J., said:

"The statute specifies the cases of justifiable homicide. 2 R. S., 660 § 3. By the second subdivision of that section the homicide is justifiable when committed in the lawful defence of such person, or his or her husband or wife, parent, child, master, mistress or servant, when there shall be reasonable ground to apprehend a design to commit a felony, or to do some great personal injury, and there shall be imminent danger of such a design being accomplished. The charge is very nearly in the language of this section. It is argued, however, that if the prisoner did apprehend a design on the part of Brush to do him some great personal injury, and believed he was in great danger, he had then a right to act upon that belief and take the life of Brush, although there was no actual imminent danger. In other words, if he believed in the danger, he had a right to act as though the danger was actually present, and the injury about to be inflicted upon him, and that the consequences of this mistaken belief must fall upon the deceased, and the prisoner must, in the eye of the law, stand entirely justified. Several particulars are to be noticed in this section as applicable to the present case. The homicide, if justifiable, must have been committed in the lawful defence of the person of the prisoner, at a time when there was reasonable ground to apprehend a design to do him some great personal injury. Who is to judge of the reasonable ground to apprehend a design to do injury? The grounds must be made to appear on the trial, and the jury must be satisfied that they were reasonable grounds upon which to found an apprehension of a design to commit the felony, or to do some great personal injury. It is true the party assailed must at the time, judge of the ground for his apprehension, but he judges and decides at his peril, so far as the question of entire justi-

fication is concerned. It will not do to hold that he who has taken the life of another is entirely justifiable, when he acts upon unreasonable grounds of apprehension, though he may have acted upon an honest apprehension of a design, on the part of the person killed, to commit a felony, or to do him some great bodily injury.

"In such a case, the crime might be only manslaughter, and that, too, of the lowest degree. But to justify the act of killing in such a case, would be to establish a rule for the security of human life, resting upon the uncertain apprehension of men who may act upon unreasonable and impossible grounds. The statute also adds this for the condition: 'And there shall be imminent danger of such design being accomplished.' The language is here changed. The question no longer depends upon reasonable grounds to apprehend imminent danger, from which a belief may be formed.

"It is, to my mind clear and explicit, and requires that there should be imminent danger of the commission of a felony or of some great personal injury. The man assaulted may have reasonable ground to apprehend a design on the part of his assailant to do him some great personal injury, and yet there may, in fact, be little or no danger of the accomplishment of the design. Suppose the party committing the assault was unarmed, and weak and infirm as compared with the party assaulted, and this disparity of strength is such that the party assaulted is able to protect his person from injury. The imminent danger of accomplishing the design would not exist, and yet the design may have been fully formed, and manifested in a way so as to leave no doubt of it. In such a case the killing of the assailant could not be justified.

"What is meant in the statute by 'such design'? Does this language imply that a design to commit a felony or to do some great personal injury had been actually formed? If so, then a reasonable ground to apprehend a design, etc., as declared in the previous part of the section, is not sufficient; but there must be added to it, not only the imminent danger, but the actual design. This is not the true construction of the language. If there is a reasonable ground to apprehend the design, and there is imminent danger that such apprehended design will be accomplished, it is sufficient. The party assailed may have reasonable ground to apprehend a design on the part of the assailant to kill him, and he may be in imminent danger, from the acts of the assailant, of being killed, and yet his assailant may not have formed the design to kill him, or to do him great personal injury. His acts may, however, be such as actually to put the life of the assailed in imminent danger. In such a case, the killing would be justifiable. I am satisfied that the legislature considered the common law carefully, and that they adopted it in the section relating to justifiable homicide, and that they have thereby provided that a homicide shall not be justified unless there was, first, reasonable ground to apprehend a design to commit a felony, or to do some great bodily injury; and, secondly, there was imminent danger of such apprehended design being accomplished; that is, that there was imminent danger that a felony would in fact, be committed, or that some great personal injury would be inflicted, unless the party was arrested by death. If I am right in this construction of the statute, the charge of the learned Justice was in strict accordance with law."

The principle so ably asserted and carefully stated by BRONSON, J., in

the principal case, that to justify the slayer it will be sufficient if there is reasonable ground to believe that the antagonist designs to kill or inflict great bodily harm, and if there is also reasonable ground to believe that the danger is imminent that such design will be accomplished, will, it is believed, be found embodied in every other well considered case where the question has been adverted to, except the cases in Mississippi. See the following cases, *post* : Logue's case, Rapp's case, Maher's case, Schnier's case, and Sloan's case.

The New York statute, expounded in the principal case, exists also in Mississippi, Minnesota and Kansas. Rev. Code Miss., 1857, p. 601 ; Gen. Stat. Minn., 1867, p. 598, § 5, sub-sec. 2 ; Gen. Stat. Kansas, 1868, p. 319, § 9. In Mississippi, it has received an exposition not differing in substance from the views of MARVIN, J., above quoted ; but in that State it was said to be a modification of the common law rule—Dyson's case, *post*—while MARVIN and BRONSON, JJ., suppose it to be in affirmance of the common law. We think the Mississippi Court is mistaken ; since the rule embraced in the statute has been declared on general principles in several States where no such statute exists. See for instance, Selfridge's case, *ante*, p. 18 ; John Doe's case, *ante*, p. 62 ; Logue's case, *post* ; Pond's case, *post*. It is true that Lord Hale declares that "it must be an actual and inevitable danger of his own life,"—1 Hale P. C., 52 ; but he is here speaking generally of civil incapacities through compulsion and fear, and he cites no authorities in support of his declaration. So, Mr. East, speaking of homicide in self-defence, says that the danger must be actual and urgent ; but he cites no other authority than the above declaration of Lord Hale. The principle embraced in the above statute is stated by Mr. East,—1 East P. C., p. 273, § 46,—and several cases are there stated in illustration. The principle seems clearly traceable to Levett's case, Cro. Car., 538. Mr. East's understanding of the rule appears to have been that if a man kill another upon a reasonable fear that the person slain has a felonious design against him, it will be manslaughter or misadventure according to the degree of caution used, and the probable grounds for such belief. 1 East P. C., 273, § 46. And this view is supported by the reasoning of the Court in Pond's case, *post*.

The exposition placed upon this statute in Mississippi is that "the danger of such design being accomplished, must be imminent, that is to say, immediate, pressing, and unavoidable at the time of the killing." Dyson's case, *post*. And that reasonable ground to apprehend the design, and imminent danger of its accomplishment must both exist at the same time. Cotton's case, *post*. But in a very well considered case subsequently determined in Mississippi, the rule is qualified, so as to bring it in accord with the current of the American cases, by using the following expressions : "The danger must be either actual, present and urgent, or the homicide must be committed under such circumstances as will afford reasonable ground to the party charged to apprehend a design to commit a felony or to do him some great bodily harm, and that there is imminent danger of such design being accomplished." "There must, at least, be some attempt to execute the apprehended design ; or there must be reasonable ground for the apprehension that such design will be executed, and the danger of its accomplishment imminent." Wesley's case, *post*.

It is to be observed that the Minnesota, as also the Missouri statute, fol-

laws that of New York, but modifies it so as to make it accord with the exposition placed upon it in the principal case, by using the words, "*and there shall be reasonable cause for believing that there is imminent danger of such design being accomplished.*" 2 Taylor's Wis. Stat., p. 1827, § 5, sub. sec. 2; 1 Wagner's Mo. Stat., p. 446, § 4.

LOGUE v. COMMONWEALTH.

[2 WRIGHT, 265.]

Supreme Court of Pennsylvania, January Term, 1861.

WALTER H. LOWRIE, *Chief Justice.*

GEORGE W. WOODWARD,

JAMES THOMPSON,

WILLIAM STRONG,

JOHN M. READ,

} *Justices.*

HOMICIDE—ACTING UPON REASONABLE APPEARANCES OF DANGER.

The killing of one who appears to be an assailant is excusable, if there be reasonable apprehension of loss of life or of great bodily harm, so imminent at the moment of assault as to present no alternative of escaping the consequences but by resistance, though it afterwards appear that there was no actual danger. [Acc. Shorter's case, *ante*, and citations.]

Error to the Oyer and Terminer Court of Clarion county.

The defendant was jointly indicted with one Ira Davis in the Oyer and Terminer of Clarion county, for the murder of Jared Lewis, but was tried separately.

He had robbed the house of Thomas Stewart, and had absconded. On the information of Mr. Stewart, a warrant was placed in the hands of Constable Cartwright for his arrest. Cartwright wrote a deputation on the writ, and gave it to Jared Lewis, a private citizen, to execute, for which service Stewart was to pay him.

Lewis armed himself with a loaded pistol, and with

two companions, William Thompson and Eli McCall, went in search of the prisoner.

In attempting to arrest him, and another who was with him, Lewis, who with his associates, were lying in wait behind some bushes, about midnight, suddenly sprang upon them as they passed, and presented his pistol at Logue's breast, saying, "Stop, men." Logue, who had a revolver, drew it and fired, the ball taking effect in Lewis' breast. He then fired a second shot, which passed through Lewis' thigh, and lodged in the calf of McCall's leg; and then fled with his companion. Lewis walked to a house near by, and died in a few minutes.

Logue and his associate left the country, but were subsequently arrested and indicted for murder. At the close of the trial, the counsel for the defendant presented a number of points, which need not be repeated here, on which they requested the instruction of the Court, all of which were fully answered.

The jury found the defendant guilty of murder in the first degree.

There was a motion made for a new trial, which, on argument, was overruled, and the prisoner sentenced.

The case was then removed into this Court by writ of error, where there were seventeen assignments of error presented by the defendant's counsel, only two of which were noticed by this Court.

John D. Mahon and *B. J. Reid* for plaintiff in error, *William H. Corbett* and *Campbell & Lamberton* for the Commonwealth.

THOMPSON, J, delivered the opinion of the Court:

We need not recapitulate the facts of this case, and will proceed at once to the consideration of what seem to be the debatable grounds in it, and they are to be found in the views of the learned judge on the subject of self-defence. But little else needs to be noticed; the charge and ruling of the Court on every other point of the case being, so far as we can discover, just and accurate.

The sixth and tenth assignments of error present the questions now for consideration. The sixth is as follows, —and the tenth is the same in substance:

“The Court erred in charging as follows, (which we suppose to be the qualifications referred to, in answer to the fifth, sixth and seventh points): ‘The prisoner’s counsel contended that the homicide might be justifiable or excusable, if Logue, the prisoner, had reasonable cause to apprehend danger to his life, and if it appeared imminent. I cannot so instruct you, unless there was actual danger to his life, and not occasioned by resistance.’”

Divesting ourselves of impressions derived from certain facts in the case, and viewing the prisoner in the light of one lawfully passing along the highway in the night-time (for we may not judge of facts which might change this aspect of the prisoner’s case), was the instruction right?

It is only in this light that we, as a court of error, can deal with the instructions. We cannot determine their accuracy by a recurrence to matters of fact, which might defeat a hypothesis. We must not be guided in our determination of the question whether the law was rightfully administered, because we may believe that the prisoner was a felon escaping from the commission of a flagitious crime at the time of the homicide, with a determination to resist all who should attempt to arrest him. These were considerations for the jury, under the evidence, and if proved, would undoubtedly change the prisoner’s chance of escape under the law of self-defence. It is only on the ground of entire blamelessness, that he might invoke the law to the extent of justifying or excusing him in taking life, and then by showing that the assault was of such a character as to induce a reasonable apprehension that he was in danger of losing his own life, or suffering some enormous bodily harm, and so the Court should have charged. The learned judge thought that the apprehension of imminent peril would not excuse. “The danger must be actual.”

Here there was a wide difference between the extent of the ground claimed as covered by the law of self-defence, and that laid down by the Court, namely: the difference between a reasonable apprehension of the danger of loss of life or limb, arising from circumstances appearing to indicate such a design on the part of the assailant, but which may, in fact, have been unreal; and that announced by the Court, that nothing will excuse a homicide in self-defence but actual danger. It was of this last position that PARKER, J., said in the celebrated trial of Selfridge,^a in Boston, in 1806, that such "a rule would lay too heavy a burden on poor humanity."

In treating of excusable homicide, Wharton in his valuable work on Criminal law, in §1021, says, "The assault may have been so fierce as not to allow him (the slayer) to yield a step without manifest danger of his life, or enormous bodily harm; and then in his defence, if there be no other way of saving his own life, he may kill his assailant instantly."

This is the principle of all the books, in case of actual danger.

After treating of many aspects of self-defence under such circumstances, in §1026, same book, another rule is given: "If the apprehension of an immediate and actual danger to life be sincere, though unreal, it is in like manner a defence;" and, it is added, "although this proposition, in its present shape, has been accepted with great reluctance, and in very recent times by the courts, and should be always applied with extreme caution, it has at all periods^b been practically recognized."

And Levett's case, Cro. Charles, 488, is cited. That was a case where an alarm having been given by a servant that there were robbers in the house, the defendant, with a drawn sword in his hand, slew a servant girl of the neighborhood, who, being lawfully in the house at the time, concealed herself in the buttery, to avoid being seen by him. This was held to be excusable homicide

^a*Ante*, p. 1.

^b"At all periods" is a misquotation. Wharton's text reads "frequently."

by misadventure. So in the case of Sir William Hawkesworth, who was killed by his game-keeper, mistaking him for a deer-stealer. These are old cases.

The principle of reasonable apprehension was laid down by the learned judge in Selfridge's case,^c to be found in Russ. on Cr. p. 485.

So it has been held in the State of New York in *The People v. Shorter*,^d 4 Barb., 460, and affirmed in the Court of Errors and Appeals, 2 Comst., 197—opinion by BRONSON, J. There the principle is thus stated: "Where one who is without fault, is attacked by another in such a manner or under such circumstances as to furnish reasonable ground for apprehending a design to take away his life, or to do him some great bodily harm, and there is reasonable ground for believing the danger imminent that such design will be accomplished, I think he may safely act upon appearances and kill the assailant, if that be necessary to avoid the apprehended danger; and the killing will be justifiable, although it may afterwards turn out that the appearances were false, and there was, in fact, neither a design to do him serious injury, nor danger that it would be done."

True, there is a statute on the subject in New York, but it has been held in many cases to be only declaratory of the common law. The same principle may be found decided in the *State v. Green*, 4 Ired. (N. C.) 409. So in Ohio, in *Stewart v. The State*,^e 1 McCord's Rep., 71. So in *Oliver v. The State*,^f 17 Ala., 587. The case of *The Commonwealth v. Seibert*, Luzerne Co., 1852, cited with approbation in *Wharton on Hom.*, 227, at length, is to the same effect.

We might multiply authorities to sustain the accuracy of the point, but it is not necessary.

I take the rule to be settled, that the killing of one who is an assailant, must be under a reasonable apprehension of loss of life or great bodily harm, and the danger must appear so imminent at the moment of the assault as to present no alternative of escaping its con-

^c *Ante*, p. 1. ^d *Ante*. last case. ^e *Ante*, p. 191. ^f *Post*.

sequences but by resistance. Then the killing may be excusable, even if it turn out afterwards that there was no actual danger.

The law of self-defence is a law of necessity, and that necessity must be real, or bear all the semblance of reality, and appear to admit of no other alternative, before taking life will be justifiable or excusable. Whenever it is set up, the case will always call for a most careful and searching scrutiny, to be sure that it rests, where alone it can rest, on the ground of real, or apparently real necessity. As the books fully define the duty of all acting under this necessity, we will not encumber this opinion by restating it.

Suffice it to say here, that as the law of necessity governs this right, it follows that there must be no blame on the part of him who seeks immunity under it. If the slayer be in the wrong, the killing will not be excusable, much less justifiable. The offence then will, according as the facts may be, come under the definition of murder, murder in the second degree, or manslaughter.

In the case in hand, the prisoner claimed the benefit of this view of the law; of course, upon the hypothesis that there was nothing wrong on his part, and that the assault upon him was of such a character, and under such circumstances as to produce that reasonable apprehension, that there was a design to take his life, or do him some great bodily harm, as justified him in firing on the supposed assailants and killing one of them. Now, as there were facts showing a sudden assault by men concealed in the bush until the moment it took place, one of them presenting a pistol towards the prisoner, and the other with stones in his hands, as if about to be used, there was room to raise the points, and call for the instructions claimed by the prisoner's counsel. The Court could not say, nor can we, that the testimony in the case by the witnesses, deprived the prisoner of his right to an answer upon this hypothesis; for the facts were alone for the jury, and they might believe or disbelieve them, as they might be credible or otherwise.

Under such circumstances, we think that the judge erred in his answer in defining the prisoner's rights under his assumed position. It having turned out that the deceased was an officer, whose object was not to kill or injure, but merely to arrest, it would have been impossible to have proved actual danger, although the appearances might, to an innocent man, have presented a case of imminent peril, which under the law, as already stated, might have excused the killing.

It is true, a refusal to charge as requested, and charging as complained of, did not necessarily imply guilt of any particular or defined grade, on failure of making the proof which the Court thought to be necessary to excuse; still it took away a bare possibility of escape, on the ground that the prisoner might be an entirely innocent man, notwithstanding the evidence in the case. Hence, we think it better, notwithstanding the circumstances which the proof presents, to send this case back for a new trial, to secure to the prisoner all the rights the law allows him, and to vindicate the law itself. The act of 1856 requires the correction of errors in law, in cases of this nature, and it does so to prevent possible, as well as certain, injury to prisoners, and in this spirit we are bound to execute it.

We see no other error whatever in the charge of the Court in any other part of the case. It is obvious, that if the law of self-defence will not, under the facts, excuse the prisoner, then his case will be murder in the first or second degree, or manslaughter, as the proof may justify; and on these points the charge was proper, clear and sufficient, in view of the testimony given.

It was suggested on the argument here, that even if there was error in the particulars discussed, it did the prisoner no harm, as the jury found him to be guilty of a wilful, deliberate and premeditated murder, and, therefore, the law of self-defence could have no application to his case. This suggestion is more plausible than sound. It would be very unsafe to prove the accuracy of all the steps in a trial by the result of the verdict. Who can

tell what the result might be in any given case where there is error in some of its parts? The result might be accurate, but it would probably be accidental. The law does not conclude parties and rights upon such uncertain grounds. Its utmost effort is accuracy, as far as it may be attained through fallible agencies, and then its mission is complete and its conclusions irrevocable.

Judgment reversed.

NOTE.—It is to be observed that in Neeley's case, *ante*, p. 101, an attempt is made by the Court to explain away the meaning of the expression "actual danger," which worked a reversal in this case. But in another part of the charge in this case, the law on the subject of the *appearances* of danger as a justification for the degree of force used, had been given correctly. For a similar instruction, treated in the same way, see Lamb's case, *post*. But in Maher's case, *post*, a slight error in this particular, added to a correct instruction by way of proviso, was held sufficient to reverse the judgment.

THE STATE v. HARRIS.

[1 JONES, 190.]

Supreme Court of North Carolina, December Term, 1853.

FREDERICK NASH, *Chief Justice*.
 RICHARD M. PEARSON, } *Judges*.
 WILLIAM H. BATTLE, }

HOMICIDE IN SELF-DEFENCE—REASONABLE APPREHENSION SUFFICIENT; OF WHICH THE JURY ARE THE ULTIMATE JUDGES.

1. Wherever there is a reasonable ground to believe that there is a design to destroy life, to rob or commit a felony, a killing to arrest such design is justifiable. [Acc. Pond's case, *post*; Selfridge's case, *ante*, p. 18; Scott's case, *ante*, p. 163; John Doe's case, *ante*, p. 62; Baker's case, *ante*, p. 75; Sullivan's case, *ante*, p. 65; Neeley's case, *ante*, p. 96; Note to Grainger's case, *ante*, p. 242; Shorter's case, *ante*, p. 256; and other cases in this SUBDIVISION.]

2. But it is for the jury, and not for the prisoner, to judge of the reasonableness of such apprehension. [Acc. Selfridge's case, *ante*, p. 18; Wiltberger's case, *ante*, p. 39; Hopkinson's case, *ante*, p. 80; Schnier's case, *post*; McLeod's case, *post*; and others.]

The case sufficiently appears from the opinion of the Court.

NASH, Ch. J., delivered the opinion of the Court:

The prisoner is indicted for murder. On the trial below, three witnesses were sworn in behalf of the State. The first was a young female, an inmate of the prisoner's family, who stated, that when she returned home, about twelve o'clock, from a neighbor's, she found there, with the prisoner, a man who was a stranger to her, the deceased. The parties remained together in the porch of the house, until near sunset, when she heard loud and angry talking. The prisoner accused the deceased of having put counterfeit money on him, and immediately went out and took the horse of the deceased, declaring he would keep him until he gave him good money. The deceased went towards Harris, declaring he would have his horse or take the prisoner's life. Harris ordered him to stop, and not touch the horse, or he would kill him, and called to his son, a small lad, to bring him his gun, which was done, and the deceased returned to the house. Harris loaded his rifle, and called to his wife to take care of his trunk. She answered from the room where it was, and prisoner called to the witness to come to him, which she did.

When the witness went out, she found Harris approaching the house, with the gun in his hands, and in passing, he observed, "I am afraid that man will do me some private harm." He went into the house, and she heard deceased say to him, "Stop, Harris, and let me talk to you," and with these words she heard the gun fire. She went into the house and found the man dead, and Harris standing in the door, between the large and small room.

The second witness was a Mr. Williams, who stated that, on the day after the homicide, he went to the prisoner's house, where the following conversation took place between them:

Witness asked the prisoner, "What does this mean?"

Answer, "It's done, and I am sorry for it, but it could not be helped." "Do you know who the man is?" "I do not." "Where did you shoot him?" "I shot him in the body." "What did you do it for?" "For a certain provocation; it will be all right; it was in self-defence." "Did you see the man have any weapon?" "I see you, but I don't know but you may have some weapon. He, (the deceased,) had conducted himself as I will not allow any man to do in my house, and, as no man should do in a gentleman's house. He was loafing about here, and some one robbed my father's house, and he might have been the man, or one of them." "You say he was loafing here, and yet you took his horse, and sent him to Mebane's, and sent word to Mebane that you would kill a man before sunset." With this the prisoner got angry; and said, "the man had passed a counterfeit \$50 bank bill on him."

Mr. Mebane stated, that just before dark, on the day the homicide took place, the prisoner's boy came to his house on the horse of the deceased, with a message from his master: he sent him back. Soon after the prisoner came on the same horse, and, being asked how he was, answered, "Well in body, but distressed in mind. I have killed a man, and don't know who he is." Witness replied, "that is a pity, you have done wrong." Prisoner answered, "Damn him, if it was to do over, I would do it again; I believe I was justified." Witness asked, "Did he threaten you?" "Yes; we had a game of cards, and he put a counterfeit fifty dollar bill on me. I took his horse, and told him if he did not give me good money I would keep him. The man then said he would have his horse or be the death of me. I called my son John to bring my rifle. I loaded it, and told him to come on, and see which would be killed first, and from that I shot him, I believe right through the heart. I am on his horse now, and am not going to run. He is a damn fine horse, and paces like a top." The name of the deceased was Winfree.

His Honor, in opening his charge, stated the law upon

the subject of homicide in general, of which there is no complaint. The case then states that the defendant's counsel insisted "that this was a case of justifiable homicide—a killing in defence of life, or of an actual robbing in the dwelling house of the prisoner, or, at most, it was but a case of manslaughter; a killing under sudden passion, or heat of blood. That the deceased threatened the life of the prisoner; that he was a stranger and dealer in counterfeit money; so that, under the circumstances, the prisoner believed his life was in danger, or that the deceased would do him some great injury; that, if mistaken in this, if the prisoner detected him in the act of stealing from his trunk, being in his dwelling-house, and after dark, he had the right to kill him. But even if such were not the fact, but the prisoner believed such to have been the intention of the deceased, and acted on that belief, it would, at most, have been but manslaughter." His Honor, upon this part of the defence, instructed the jury, "that whenever there is a reasonable ground to believe there is a design to destroy life, or to rob, or to commit a felony, the killing of the assailant will be justifiable. But it is for the jury, and not for the prisoner, to judge of the reasonable ground for apprehension, and whatever he may say, *unless the jury think*, from the testimony, the prisoner had reasonable grounds for apprehending damage to his person or property, his defence must fail. Should the jury believe the prisoner detected the deceased in the act of robbing his trunk, and thus killed him, they should acquit. So, if they should believe the prisoner found the deceased in such a situation as already to have manifested such purpose, they should convict him of manslaughter.

* * * * *

The first objection to the charge is, as to the prisoner having reasonable ground to believe that the deceased intended to take his life or rob him. The prisoner's counsel contended, that, if the prisoner was mistaken in believing that the deceased intended to kill or rob him, yet, if *he believed* his life was in danger, or he was in

danger of being robbed, and acted on that belief, it would, at most, have been but manslaughter. His Honor laid down the law upon that subject, and stated, whenever there is reasonable ground to believe there is a design to destroy life, to rob or commit a felony, the killing will be justifiable. But it is for the *jury*, and not the prisoner, to judge of the reasonable ground of the apprehension. We see no error in these directions. It is the course which that humane man and excellent judge, Sir MICHAEL FOSTER, pursued in a case before him. A man was indicted for the murder of his wife. He had in the morning loaded his gun, in the hope of finding some game: being disappointed, he discharged the load, and put the gun in a safe place. During his absence, a servant without his knowledge, took the gun, loaded it and went after some game, and while the prisoner was still absent, returned it to the place from which he had taken it, where the prisoner found it, in all appearance, as he had left it. The gun was carried into the room where his wife was. He took it up, touched the trigger, the gun went off and killed his wife. I did not enquire, says Justice FOSTER, whether the poor man had examined the gun before he carried it home, (where the accident occurred,) but, being of opinion, upon the whole evidence, that he had *reasonable ground* to believe that it was not loaded, *I directed the jury, that, if they were of the same opinion*, to acquit him. Foster, 265; 1 Russ. on Cr., 541. In Meade's case,* Lewin's C. C., 164, the same course was pursued. Meade had, the day before the killing, been very badly injured and abused by a party of boatmen, at Scarboro', and was rescued from them by the police. When the latter were carrying him off, the boatmen called to him that they would come that night and pull his house down. He lived about a mile from Scarboro', and, in the middle of the night, a great number of persons came about his house, singing songs of menace, and using violent language, indicating that they had come with unfriendly intentions. Meade, under an

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apprehension, as he alleged, that his life and property were in danger, fired a pistol, by which Lace, one of the party, was killed. Justice HOLROYD, in charging the jury, instructed them, "If *you* are satisfied there was nothing but the song, and no appearance of further violence; if *you* believe that there was no reasonable ground for apprehending further damage," etc. In such case, the existence of reasonable ground of belief was left to the jury. The charge in this case, then, is shown to be sanctioned by the highest authority. Roscoe's Cr. Ev., 646. It is also sanctioned by reason. The *existence* of reasonable ground is a matter of fact to be determined by the jury. If the person charged with the homicide, is to judge for himself, whether this reasonable ground existed, the most atrocious murders may be committed with impunity.

The prisoner says he believed his life was in danger. Who can look into his heart? If the *law allows him* to judge, who can contradict him? The circumstances are nothing; it is his *belief* that justifies him. The law is not so. It is only from circumstances accompanying the transaction, that reasonable ground can be ascertained, and of their bearing and influence the jury are the sole judges.

* * * * *

Judgment affirmed.

NOTE.—In Cotton's case, *post*, it is said that what is reasonable ground to apprehend a design to commit a felony or do some great personal injury, "must always be as much, or, indeed more, a question of fact for the jury than a question of law for the Court; for while it is true in regard to inanimate objects, where the fact is the same, the law must also be the same, this is not true, even as a general rule, in this class of cases." The case of Gladden v. The State, 12 Fla., 562, 576, is the only case we have seen which intimates a doctrine contrary to the principal case. WESTCOTT, J., in delivering the opinion of the Court, said: "The instruction, numbered six, and refused was: 'You must be the judges whether the danger must be immediate or unavoidable at the time of the killing. To justify the prisoner in the act, must depend upon the facts and circumstances of the whole state of facts before him, as proven before you.' What facts justify or excuse the killing is a question of law *not* to be determined by the jury. What facts are sufficient to excuse the act, may be stated by the Court,

and it is the province of the jury to determine whether such facts exist in the particular case."

As to whether the jury are to form their conclusions from the standpoint of ordinary intelligence and courage; or, whether in forming their judgment, they may consider the peculiar infirmities of the defendant, see the last part of the note to Grainger's case, *ante*, p. 242.

CAMPBELL v. THE PEOPLE.

[16 ILL., 17.]

Supreme Court of Illinois, Mount Vernon, November Term, 1854.

SAMUEL H. TREAT, *Chief Justice.*

JOHN D. CATON, } *Associate*

ONIAS C. SKINNER, } *Justices.*

HOMICIDE—UNCOMMUNICATED THREATS—APPEARANCES OF DANGER.

1. On a trial for murder, where it appeared that the deceased sought the accused at his own house, with the design to arrest or assault him, having a hatchet in his hand, it is competent for the accused to show that the deceased had, on the day of his death, and at other times shortly previous, made threats against him, although such threats may never have come to the knowledge of the accused, until after the homicide was committed. [Acc. Goodrich's case, *post*, and others following it. *Contra*, Coker's case, *post*; Atkins' case, *post*; Chambers v. Porter, *post*.]

2. Men, when threatened with danger, must determine from appearances and the actual state of things surrounding them, as to the necessity of resorting to self-defence; and if they act from reasonable and honest convictions, they will not be held responsible criminally, for a mistake in the extent of the actual danger, where other judicious men would have been alike mistaken. A contrary rule would make the law of self-defence a snare and a delusion: it would become but a mockery of the sacred right of self-preservation. [Acc. Shorter's case, *ante*, p. 256; Logue's case, *ante*, p. 270; Harris' case, *ante*, p. 276, and the cases there cited; Schnier's case, *post*; Maher's case, *post*; Reins' v. People, 30 Ill., 256.]

3. Hence, on a trial for murder, an instruction which leaves the jury to infer that the danger to the accused of death or great bodily harm, must have been actual and positive, in order to excuse the slayer, is erroneous, and ground of reversal.

This cause was tried before PARRISH, J., at the June term, 1854, of the Massac Circuit Court.

J. Jack, for plaintiff in error; *J. A. Logan*, District Attorney, for the People.

CATON, J., delivered the opinion of the Court:

The plaintiff in error, who is a negro, was indicted for the murder of Goodwin Parker. The evidence in the case tends very strongly to show that the deceased made an assault upon the prisoner, and that the homicide was committed in necessary self-defence. It appears that the deceased and three others went to seek the prisoner at his father's house in the night time. The deceased went to the door of the house, leaving his companions thirty or forty yards back, to whom he was to give warning, if Campbell was in the house. Shortly after the deceased went to the door, he called to the others to come on, and informed them that the negro was there. They rushed up, when the deceased and prisoner were seen some distance from the house, engaged together, and there the deceased was stabbed, and died in a few minutes. When the deceased went to the house, he had a hatchet in his hands, which was found near the spot where he was killed; and after the negro was committed to jail, a wound was observed upon his head, which penetrated to his skull, which appeared to have been made with a hatchet, an ax or a hammer. There was no pretence that there was any sort of justification or legal cause for arresting or assaulting the prisoner. Upon the trial, the defence offered to prove that on that day, and at other times shortly before his death, the deceased had made threats against the prisoner. This evidence the Court ruled out, and an exception was taken. In this the Court unquestionably erred, although they may never have come to the knowledge of the defendant, till after the homicide was committed. If the deceased had made threats against the defendant, it would be a reasonable inference that he sought him for the purpose of executing those threats, and thus they would serve to characterize his conduct towards the prisoner at the time of their meeting and of the affray. If he had threatened to kill,

maim, or dangerously beat the defendant, it would be a fair inference, especially so long as the evidence shows that he had a hatchet in his hands, that he had attempted to accomplish his declared purpose; and if so, then the prisoner was justified in defending himself, even to the taking of the life of his assailant, if necessary. While the threats, of themselves, could not have justified the prisoner in assailing and killing the deceased, they might have been of the utmost importance in connection with the other testimony, in making out a case of necessary self-defence. The evidence offered was proper, and should have been admitted.

The second instruction given for the prosecution, and which was excepted to, was as follows: "If the jury believe from the evidence, that the defendant was pursued by the deceased, Goodwin Parker, and turned upon him and slew him with a knife, or other instrument capable of producing a like death, when it was not necessary for self-preservation, or in necessary self-defence, or to prevent his receiving great bodily harm, although they believe there was no previous malice on the part of the defendant towards the deceased, yet they are bound to find the defendant guilty of manslaughter, and fix his term of confinement in the penitentiary of the State at not more than eight years." This instruction, if not absolutely wrong, was at least liable to misconstruction, and to be understood by the jury as depriving the defendant of the right of self-defence, unless his danger was not only apparently imminent, but was real and positive. If so understood, the instruction was wrong. If the defendant was pursued or assaulted by the deceased in such a way, as to induce in him a reasonable and well grounded belief that he was actually in danger of losing his life, or suffering great bodily harm, when acting under the influence of such reasonable apprehension, he was justified in defending himself, whether the danger was real, or only apparent. Actual and positive danger is not indispensable to justify self-defence. If one is assaulted with a sword in such a way as to indicate an

intent to take his life, and with an apparent ability to accomplish such intent, he is not bound to stop and enquire whether the sword is but a lath, or whether the assault is but a jest, before he repels it with the necessary force to protect himself against the threatened harm. Or if one is assaulted with a pistol in such a way as to manifestly show a design to slay him, he may be justified in killing his assailant, although it should turn out the pistol was not loaded, and the only design was to frighten him. Men, when threatened with danger, are obliged to judge from appearances, and determine by the actual state of things, from the circumstances surrounding them, at least as much as if placed in other and less exciting positions; and it would be monstrous to say, that if they act from real and honest conviction, induced by reasonable evidence, they shall be held responsible criminally for a mistake in the extent of the actual danger, where other reasonable and judicious men would have been alike mistaken. A contrary rule would make the law of self-defence a snare and a delusion. It would become but a mockery of the sacred right of self-preservation.

* * * * *

The judgment must be reversed, and the case remanded.

Judgment reversed.

SCHNIER v. THE PEOPLE.

[23 ILL., 17.]

Supreme Court of Illinois, Mount Vernon, November Term, 1859.

JOHN D. CATON, *Chief Justice*,
 SIDNEY BREESE,
 PINKNEY H. WALKER, } *Associate Justices.*

JURY TO JUDGE OF NECESSITY OF KILLING—ACTING UPON REASONABLE APPEARANCES.

1. It is for the jury to determine whether the circumstances surround-

ing a homicide were such as to induce a belief in a reasonable mind, that the act was necessary to save his own life, or that of a wife or child. [Acc. McLeod's case, *post*; Harris' case, *ante*, p. 276; Wiltberger's case, *ante*, p. 39; Meridith's case, *post*, and others.]

2. A party accused of murder may show in defence, that he committed the act under a belief which was sufficient to satisfy a reasonable mind, that his own life, or that of a wife or child were in immediate danger, although the danger was only apparent.

3. The necessity for taking the life of the deceased need not be real and absolute, but if the necessity is so apparent as to induce a belief in a reasonable mind, that the danger is so imminent that no other means of escape exists, but to take the life of the deceased in order to preserve that of the accused, such apparent danger will justify the homicide. [Acc. Campbell's case, *ante*, p. 282; Selfridge's case, *ante*, p. 18; Shorter's case, *ante*, p. 256; Logue's case, *ante*, p. 270; Meridith's case, *post*; Pond's case, *post*; Scott's case, *ante*, p. 163; Baker's case, *ante*, p. 75; Sullivan's case, *ante*, p. 65; Neeley's case, *ante*, p. 96; note to Grainger's case, *ante*, p. 242; Rapp's case, *post*; and other cases in this SUBDIVISION.]

This was an indictment for murder, found by the Grand Jury of Clinton county, at the March Term, 1859, and tried at the August Term, 1859. The defendant was found guilty of manslaughter, and sentenced to confinement in the penitentiary for eight years.

The evidence tended to show that defendant and deceased had a quarrel about a fence; that at the time of the killing, they were standing on opposite sides of the fence, quarrelling, the defendant throwing down the fence. The defendant's wife and son, and another young man were there. The defendant was standing on his own land. The deceased threw a rail over to the side of the fence where the defendant was standing; but it did not appear whether he threw it at any one or not; nor did it appear that it hit any one. The deceased was seen to fall; and the defendant, while supporting the head of the deceased, who was bleeding at the nose, was heard to say that the stroke (*schlag*) was rather hard, and that he was sorry for it. Defendant afterwards told a witness that he had struck deceased on the arm, but did not think it would hurt him so that he would die. The deceased died of the injury the same day.

* * * * *

The following instructions of the Circuit Judge were

criticized in that portion of the opinion that relates to the law of self-defence :

The People's tenth instruction. [Quoted in the opinion of the Court.]

The People's twenty-second instruction :

But upon the ground of justifiable homicide, or the principles of self-defence, the Court further charges you, that even although you should believe that Theising, [the deceased] attacked the defendant or his son, still, if you believe, from the evidence in this case, the party assailed could have escaped his adversary's vengeance, at the time of the attack, without the killing of Theising, the defence of justification or self-defence has failed, and the defendant cannot be acquitted upon the law of self-defence.

The defendant's tenth instruction as asked for by the defendant, and as modified by the Court:

The Court instructs you that if you believe from the evidence that the deceased, Thiesing, struck with, or threw a rail or stake at the defendant, Schnier, and within the distance to strike with, or hit, by throwing, and that the defendant, Schnier, thereupon killed the deceased, [the Court here inserted the words "without malice,"] under the honest belief, however erroneous it may have been, that he was in imminent danger, [here the Court inserted the words "at the time "], of losing his life or of receiving great bodily harm, from the striking or throwing as aforesaid, [here the Court inserted the words, "and retreat was inconsistent with his personal safety"], then you ought to find a verdict of not guilty.

The defendant's thirteenth instruction, as asked for, and as modified by the Court:

The Court instructs the jury, that if they believe from the evidence, beyond a reasonable doubt, that the defendant struck and killed the deceased, yet if the deceased struck at or hit him with a rail or stake, or any other missile, and was in striking or throwing distance,

and thereby, [here the Court inserted the words, "and by such means"], produced a reasonable and well-grounded belief in the mind of the defendant, that he was in imminent danger of receiving great bodily harm from the deceased, [here the Court inserted the words, "and that retreat was inconsistent with his personal safety"], then he was justified under the law, and must be found not guilty.

* * * * *

So much of the opinion of the Court as relates to the instructions and to the above doctrine of self-defence is as follows :

WALKER, J. * * * * *

The prosecution asked, and the Court gave, against the objection of the accused, this instruction: "If the jury believe from the evidence, that the defendant was in the commission of an unlawful act against the property of Benedict Theising, at the time of the difficulty between the prisoner and Theising, which terminated in said Theising's death, and that said difficulty was by defendant's procurement, and that during said difficulty defendant struck said Theising with a deadly weapon, inflicting injuries upon said Theising as charged, then it must appear, either that the defendant in good faith declined any further difficulty with Theising, or that said blow, if you believe it was inflicted by defendant, was inflicted in necessary self-defence, or in defence of his wife or son; and if such does not appear, then the verdict should be, guilty of murder. [People's tenth instruction].

This instruction is liable to the construction that before the accused would be justified in the infliction of the blow, it should have been necessary for his self-preservation. It has been held by this Court, *Campbell v. The People*,* 16 Ill., R. 18, that the necessity for taking the life of the deceased need not be real and absolute; but if the necessity is so apparent as to induce the belief in

**Ante*, last case.

a reasonable mind, that the danger was so imminent that no other means of escape existed but to take the life of the deceased in order to preserve that of the accused, that such apparent danger will justify the homicide. It is not to be expected, nor can it be required of men menaced with apparent imminent and unavoidable danger, that they will act with that deliberation, and cool circumspection that men do under ordinary circumstances. They cannot be expected to resort to, and fully test any means that may remotely promise safety, but at the same time, they must be held to employ all means for their escape, that to a reasonable understanding would seem to promise safety, before they can be justified in slaying their antagonist.^b But if the danger seems to be so imminent and pressing, as to a reasonable mind would seem, under the circumstances, to afford no other mode of escape, then the slaying would be justified, although the danger was only apparent. Under this instruction the jury may have reasonably inferred, that there could be no justification, unless the necessity to destroy life in self-defence was actual, and not apparent, although regarded sufficient by all reasonable understandings. This instruction should have been so modified as to leave it to the jury to say, whether the circumstances surrounding the transaction were such as to induce the belief of its necessity in a reasonable mind, and whether the accused acted upon such a belief; and failing to do so, it was erroneous.

The Court announce as the law, the same rule in the People's twenty-second instruction, and it is there so clearly announced that the jury could not fail to so understand it, and the presumption is, that they regarded and acted upon it in forming their verdict. It, like the tenth instruction, and for the same reasons, was erroneous, and should have been modified before it was given. The same rule is adopted in the tenth and thirteenth instructions asked by defendant, and they were, therefore, erroneous. * * * * * * *

^bAcc. Meredith's case, *post*.

Judgment reversed.

MAHER v. THE PEOPLE.

[24 ILL., 241.]

*Supreme Court of Illinois, April Term, 1860.*JOHN D. CATON, *Chief Justice.*SIDNEY BREESE,
PINCKNEY H. WALKER, } *Associate Justices.***HOMICIDE—ACTING UPON APPEARANCES OF DANGER.**

A party may defend himself by taking life, whether his danger is real or not, if the danger is apparently so imminent and pressing, that a prudent man might suppose himself in such peril, as to deem the taking of the life of his assailant necessary to self-preservation, [Acc. Schnier's case, *ante*, last case; Selfridge's case, *ante*, p. 18; John Doe's case, *ante*, p. 62; Sullivan's case, *ante*, p. 65; Neeley's case, *ante*, p. 101; Robert Jackson's case, *post*; Pond's case, *post*; and others.]

This was an indictment for murder. The facts are substantially as follows:

The parties came to the house of deceased in the same wagon and supped together, at the house of the deceased. They were neighbors, living about half a mile apart, and in some degree related. The witnesses were the children of deceased. The prisoner and deceased came to the house of deceased about sundown. Both were intoxicated. While at supper, deceased undertook to whip his wife and children with a horsewhip; defendant interfered and a scuffle ensued. They then agreed to adjourn the fight until next day. They shook hands, and defendant started off. After he got out of the inclosure, he picked up a club; deceased picked up a mop-handle; which took a club first, does not appear. Defendant turned once or twice as he was going away, had angry words with deceased; no proof what the words were, except that deceased said that he did not want him and his wife around him any more—to clear off the place. Prisoner said he had made free to eat

supper there. Defendant then started off, and halloed and said that the family helped deceased to whip him. The deceased started after prisoner, with the mop-handle drawn; prisoner was then about twelve rods off, and going away.

They came together, and blows were struck; who struck first, does not certainly appear; the mop-handle was found broken, and it seems that it must have been broken before deceased received the blow, that caused his death. Dan Maher, a son of deceased, saw the whole affair, and was sworn, but the People refused to ask him any questions.

Upon the return of the verdict of the jury, the defendant moved the Court for a new trial, which motion was overruled by the Court, HOLLISTER, J., presiding.

Glover, Cook & Campbell, for the Plaintiff in Error;
W. Bushnell, State's Attorney, for the People.

WALKER, J.—On the trial of this cause in the Court below, the defendant asked the Court to give this, among other instructions:

“If James Maher made an attack upon the defendant with a deadly weapon, at a time when the defendant was going away from him, and the circumstances of the attack were sufficient to excite the fears of a reasonable person, that the said James Maher intended to do the defendant some great bodily harm, and defendant acted under the influence of such fears, and at the time struck the said James Maher and killed him, such killing is neither murder nor manslaughter, but justifiable homicide, and the prisoner should be acquitted.” Which instruction the Court refused to give as asked, but qualified it as follows:

“Provided the jury believe the defendant used no more force than was necessary, to prevent such bodily harm.”

This instruction as asked, was not strictly accurate, as it should also have informed the jury, that the defendant must believe, from the surrounding circum-

stances, that the danger was real, and that he believed it was necessary that he should take the life of his assailant to preserve his own, or to avoid a great bodily injury. But when the qualification was added, this instruction became clearly erroneous. As it was given, and as it must have been understood by the jury, it deprived the defendant of the right of self-defence, unless the danger was real and not apparent. This qualification lays it down as a rule of law, that an actual and positive danger must exist, before he could justify the killing. Although this is not the precise language employed, yet this is its manifest import, and the jury must have so understood it.

This Court, in the case of *Campbell v. The People*,^a 16 Ill. R., 17, held that a person when threatened with danger, must determine from the appearance and the surrounding circumstances, as to the necessity of resorting to self-defence. And that if the danger was apparently so imminent, and pressing, that a reasonable and prudent man would suppose that it was necessary to take the life of his assailant, to preserve his own, or to avoid the infliction of a grievous bodily injury, then the killing would be justifiable. It cannot be true, that a man when menaced with what would appear to a reasonable mind to be imminent danger, should wait until it is determined to be real, before he can act. There is no question that the person menaced must act in perfect good faith, and believe that it is really necessary that he should destroy life, to avoid what appears to be a real and imminent danger. This doctrine was again announced in the case of *Schnier v. The People*,^b 23 Ill. R., 17, and is decisive of this question.

No other error is perceived for which the judgment should be reversed. But for the giving the instruction as it was modified, the judgment of the Court below must be reversed, and the cause remanded.

Judgment reversed.

^a *Ante*, p. 282. ^b *Ante*, last case.

NOTE.—This case should be read with Neeley's case, *ante*, p. 96; Lamb's case, *post*, and Evans' case, *post*; and the comparison will be instructive, as showing the different manner in which an error of the same character will be viewed by different Courts, and under different states of fact. In Neeley's case and Lamb's case, instructions of the same character as the qualification which worked a reversal here, and erroneous in a much greater degree, were held good. In Sullivan's case, *ante*, p. 65, an instruction informal in a particular similar to the principal case, was held not erroneous.

RAPP v. COMMONWEALTH.

[14 B. MONROE, 615.]

Court of Appeals of Kentucky, Summer Term, 1854.

THOMAS A. MARSHALL,	<i>Chief Justice.</i>
B. MILLS CRENSHAW,	} <i>Judges.</i>
JAMES SIMPSON,	
HENRY J. STITES,	

SHOOTING WITH INTENT TO KILL—ACTING UPON APPEARANCES—CONTINGENT THREAT, COMMUNICATED—DEFINITION OF ASSAULT.

1. To constitute the offence of maliciously shooting with intent to kill, under the 2d Section of Article 6, of the Revised Statutes of Kentucky, edition 1852, p. 251, the offence must be such that it would have been murder, had death ensued. If the offence had been under such circumstances as to constitute *manslaughter*, had death ensued, then, death not ensuing, the offence becomes the misdemeanor defined by Article 17, ch. 28, p. 262. The offences designated by these two different statutory provisions are grounded on the distinction between murder and manslaughter. [See Hopkinson's case, *ante*, p. 80.]

2. The sudden heat and passion referred to in the statute last named, must be a passion caused by such provocation, as had death ensued, would have reduced the offence from *murder* to *manslaughter*. Mere words or gestures do not constitute such a provocation.

3. If from all the circumstances attending the infliction of a wound, the party wounding had reasonable grounds to believe, and did believe, that the party wounded, intended to proceed immediately to the infliction of bodily harm upon him with a knife in his hand, and that he would do so unless prevented by such act of defence as was then in his power, the act excusable on the ground of self-defence.

4. It was competent for the defendant indicted for shooting maliciously with intent to kill, to prove that a son of the person wounded, who was in the store when the defendant and his father entered it, (his father having

invited defendant into the store,) immediately ran up the stairs, and returned about the time defendant shot at his father, with a pistol, which he snapped at defendant, and that he had had such pistol loaded some time before, and had then made a contingent threat to shoot defendant, of which defendant had been notified. This evidence would tend to elucidate the motives and acts of the parties. [Acc. Goodrich's case, *post*; Monroe's case, *post*; Keener's case, *post*; Pridgen's case, *post*; Campbell's case, *ante*, p. 282; Rippy's case, *post*; Robert Jackson's case, *post*; and others.]

5. An assault in law is an effort to strike, cut, or shoot, within striking, cutting, or shooting distance. If a party start to strike or cut, and before he gets within striking or cutting distance, stops and abandons his purpose, it is not an assault in law.

The facts are stated in the opinion of the Court. The Court of Errors having been equally divided upon the question raised upon the instructions of the circuit judge, they are omitted.

The instruction as to what constitutes an assault, and which the Court of Errors holds technically correct, was as follows:

"That an assault in law was an effort to strike, cut or shoot within striking, cutting or shooting distance; and if a party started to strike or cut, and before he got within striking or cutting distance, stopped and abandoned his purpose it was not an assault in law."

Runyan, Breck and Harris, for appellant; *J. Harlan*, Attorney General, for the Commonwealth.

MARSHALL, Ch. J., delivered the opinion of the Court:

This is an appeal from the judgment of the Madison Circuit Court, by which, in conformity with the verdict previously rendered, Daniel Rapp was sentenced to be confined in the jail and penitentiary of this Commonwealth for one year. The crime charged in the indictment, and of which he was found guilty, is that of feloniously, wilfully and maliciously shooting and wounding David J. Rowland, with a pistol, and with intent then and there to kill him, but of which wound Rowland did not die.

The indictment charges the offence described in the 2d Section of the Sixth Article of Chapter 28th, of the Revised Statutes, [ed. of 1852], p. 251, and the accused was

convicted and sentenced under that section. The offence is that of malicious shooting with intent to kill; and a malice must exist to constitute the crime, it seems to follow, and it is our opinion that the case under this section of the statute must be such as would be murder if death had ensued. And if the case be such as would not be murder, if death had ensued, that is, if the woundin be not in self-defence, but done in a sudden affray or in a sudden heat and passion, without previous malice, it is not a felony punished by the section referred to, but is a misdemeanor defined and punished by the 1st Section of Article 17, Chapter 28, of the Revised Statutes, [ed. c. 1852], p. 254. This section, in our opinion, defines a case which if death were to ensue would be manslaughter. Thus, the established distinctions between murder and manslaughter, furnish the true grounds for discrimination between the offences denounced and punished by the two sections referred to.

In view of these grounds of discrimination, we are of opinion that the sudden heat and passion referred to in the section last cited, in defining the misdemeanor therein described, must be a passion caused by such provocation as in case death had ensued from the wound, would reduce the offence from murder to manslaughter. And mere words and gestures, though they may excite passion do not constitute such provocation as will of itself extenuate a homicide committed with a deadly weapon and make it manslaughter. This position is laid down in all the elementary books which we have seen, and is sustained by the current of adjudged cases, and is too familiar to require a reference to authority.

With these preliminary remarks not inapplicable to the case, we proceed to state briefly the general facts of the case, and the questions made on the trial. It appears that Rowland, having been informed of certain conduct of Rapp which he deemed injurious and offensive to himself, called Rapp into his store, and placing himself in position nearer the front door than that occupied by Rapp, charged him with offensive acts, and, upon h

denial, called him a liar, and used other offensive language; and, as he himself says, told Rapp that if he did the like again he would cut his ears off, and then making a movement, the direction of which he describes by reference to objects in his store, stopped, as he says, with his pocket-knife half or entirely open, and said, "this is the knife I will do it with," being then from five to seven feet from Rapp, who drew a pistol and shot him in the cheek-bone, etc.; but he says he made no motion or attempt to use the knife, and did not, by word or act, indicate an intention to use it at that time, or at any time, except upon the contingency mentioned.

Two witnesses for the defence speak of the threat and attitude of Rowland. One of them says, that coming in front of Rowland's store, he saw him with an open knife in his hand raised above his head, and heard him tell Rapp he was a liar and he had caught him in it, and he would cut his ears off. The other witness also states the threat of Rowland, with an open knife in his hand, and without any contingency. He also speaks of the movement of Rowland; and of his stopping before uttering the threat. But how long he stopped before the pistol was fired, is not stated by any one.

This Court is of opinion that even if Rowland did not in fact intend to proceed immediately to cut off Rapp's ears, or otherwise to use his knife in inflicting bodily harm upon him, still, if from his offensive language, his threat, his attitude, and proximity, and from the fact that he called Rapp into his store, and after taking his position, immediately commenced his reproaches, terminating with a threat, and from all other circumstances developed by the evidence as existing at the time, and which may bear upon the question of intention, the jury should be of opinion that Rapp did believe, and that he had reasonable ground to believe, that Rowland intended to proceed immediately to the infliction of bodily harm*

*Or more accurately *great* or *enormous* bodily harm. The current of all the cases runs in favor of this qualification. But this might be understood, the weapon used by the threatener being a deadly weapon.—Eds.

upon him with the knife in his hand, and that he would do so unless prevented by such an act of self-defence as was then in the power of Rapp, then the shooting by Rapp was excusable on the ground of self-defence and apparent necessity. But if he had not reasonable ground to apprehend immediate violence to his person by Rowland by the use of the knife, then his act of shooting and thus aiming at the life of Rowland was not only not excusable as being in self-defence, but it was not done under such provocation as, on the ground of heat and passion, would make it a misdemeanor instead of a felony.

But this Court is equally divided upon the question whether the instructions of the Circuit Court as contained in the qualification to the instructions given for the defendant, do or do not put the case before the jury upon the principles above cited. There cannot, therefore, be a reversal on account of this qualification. With respect to which we remark further, that the definition of an assault therein contained is technically correct.

We are of opinion, however, that the Court erred in refusing to permit the defendant to prove that Hugh Rowland, a son of the party wounded, who was in the store when his father and Rapp entered it, but immediately ran up stairs and returned about the time of the shooting with a pistol which he aimed at Rapp and snapped at him, had had his pistol loaded a few days before, and had then made a contingent threat to shoot Rapp, of which Rapp was notified before the interview with Rowland in which he shot him. This evidence would tend to elucidate the motives and acts of the parties, and its exclusion was an error prejudicial to the accused.

Wherefore the judgment is reversed, and the cause remanded for a new trial in conformity with the principles of this opinion.

Judgment reversed.

MEREDITH v. COMMONWEALTH.

[18 B. MONROE, 49.]

*Court of Appeals of Kentucky, Summer Term, 1857.*B. MILLS CRENSHAW, *Chief Justice.*

JAMES SIMPSON,	} <i>Judges.</i>
HENRY J. STITES,	
ALVIN DUVAL,	

MUTUAL COMBAT WITH DEADLY WEAPONS—DUTY OF RETREATING—ACTING UPON APPEARANCES.

1. The law allows an individual, in defence of his person or property, to use such means as are necessary. In the selection and use of these means, he must of necessity, exercise his own judgment. He acts at his peril, and if he goes beyond what is necessary to accomplish the object, and violates the law, he must abide the consequences: in the exercise of this judgment he must act rationally.

2. If one is threatened with death, or some great bodily injury, and has reasonable ground to believe that it will be immediately inflicted, unless prevented by an act of self-defence, which is in the power of the person assailed, he has the right to use such defence for his own safety, although it might afterwards appear that there was no real design to inflict the apprehended injury. [Acc. Rapp's case, *ante*, last case. Shorter's case, *ante*, p. 256, and citations.]

3. Therefore an instruction that the defendant might lawfully kill his assailant, "if he had no safe means of escaping"; and that he is not excusable "if he could have safely retreated from the danger, and by that means have saved his life and person," is erroneous, because it leaves out of view or negatives the principle above stated.*

4. Whether reasonable grounds for the belief existed on the part of the defendant that he was in imminent danger of death or great bodily harm, is a question of fact for the jury. [Acc. Selfridge's case, *ante*, p. 18; McLeod's case, *post*; Harris' case, *ante*, p. 276; Wiltberger's case, *ante*, p. 39; Schnier's case, *ante*, p. 285.]

The facts are stated in the opinion of the Court.

McFerran, for appellant; *James Harlan*, Attorney-General, for the Commonwealth.

* The instruction should rather have been that, if in the judgment of a reasonable man, placed in his situation, he could have safely retreated, etc., the killing is not excusable. See the opinion.—Eds.

STITES, J., delivered the opinion of the Court:

This appeal is prosecuted by the appellant from the judgment of the Circuit Court, sentencing him to two years confinement in the penitentiary, for killing one Ireland

The only important questions in the record arise upon the instructions given to the jury by the Circuit Court, and the propriety of its refusal to allow others asked for by the accused; and in determining these points, it becomes necessary to recite, briefly, the substance of the testimony before the jury.

The homicide occurred in a village in Grayson county, in August, 1854, and was the result of an affray, originating in a quarrel about a game of marbles.

The proof conduces to show, that a number of persons had assembled near a grocery in the village, and were engaged, or some of them, in playing marbles. A bet of ten cents was made upon the game, and after it was finished, an enquiry arose as to who had the stakes. Meredith accused a bystander of having the money, who denied it, and called Meredith a liar, to which the former replied, he was joking; then Ireland, the deceased, said to Meredith, that language was too harsh for him to use; to which Meredith replied, "If anybody took it up they might help themselves." It was then proposed that all should be searched to see who had the stakes, but to this Meredith refused to submit. He then left the crowd and proceeded to a house standing near, but upon the request of the bystander, whom he had before accused of having the stakes, came back, and when near the crowd, said, "Whoever accused me of having the stakes told a damned lie." Ireland, the deceased, then got up and said they all accused him of it, and immediately commenced throwing stones at Meredith, who backed off from the crowd, retired a short distance and returned, saying to Ireland, he would see him another day. Ireland's friends then persuaded him to go out and fight Meredith, saying he should have a fair fight. He, then, and a number of his friends, pulled

off their coats, and "rolled up their sleeves," preparing for the fight, and "then walked off to one side," picked up a rock and threw it at Meredith. The "crowd standing by, commenced hallooing to Ireland to stone him," "kill him," "give it to him," and he continued to throw stones at him until Meredith retreated about seventy-five yards, occasionally throwing stones back at Ireland. Meredith continued to retreat from the ground until he reached his brother's house, about two hundred yards from the crowd and the grocery. He went into the house, and was soon seen coming out with a gun, carrying it in one hand by his side, and up the street towards the crowd.

Ireland, who had returned from pursuing Meredith, was immediately informed that the latter had a gun, and was told to get a gun from Vinson, a bystander, who had one present. He at once stepped to Vinson, took his gun, cocked it, started out into the street in front of Meredith, holding the muzzle elevated; when he reached the middle of the street he stopped, still holding the gun with both hands, pointing down the street towards Meredith. Meredith stepped to one side of the street, immediately raised his gun and fired, and Ireland fell. Ireland's gun and Meredith's were fired simultaneously. The report sounded as though there was but one gun; and Ireland, as some of the witnesses say, was taking a hip-rest at Meredith, when the latter raised his gun and shot.

Upon these facts, or evidence conducing to establish them, the appellant moved a number of instructions, which were all refused, and instead thereof, the Court gave instructions, numbered from one to nine, to all of which appellant excepted, as he did to the refusal to give those he had asked for.

We perceive no serious objection to the instructions given by the Court, except No. 2. This conflicts with No. 5, and does not, in our opinion, correctly lay down the law of the case. No. 2, is as follows: "If the jury believe, from the evidence, that the defendant killed

Ireland in self-defence, they ought to find him not guilty; and if Ireland assaulted the defendant, and he had reasonable grounds to believe he was in danger of sustaining great bodily harm, or the loss of his life from such assault, he might resist such assault; and, if necessary to protect his life or person from great bodily harm, he might kill Ireland, if he had no safe means of escaping. But if the defendant could have safely retreated from the danger, and by that means saved his life and person, he is not excusable for the killing of Ireland."

The qualifications in the latter part of this instruction, excusing the homicide only upon the ground that the defendant could not have safely retreated, and thereby have avoided the danger to himself, however imminent it may have been, or he may have reasonably supposed it to be, virtually deprived him of a reasonable exercise of his own judgment, in determining what was necessary to be done for the protection of his person or life—a right which the law confers on every man, but which must be exercised at his peril, and subject to the revision of his peers.

By this instruction the jury are substantially informed, that although the accused may, from the acts of Ireland—his sudden taking of the gun from Vinson, stepping out into the street with it in both hands, presenting it directly at him, and other attendant circumstances, have had reasonable grounds to believe, and did believe, that he would immediately kill him, or inflict great bodily harm by shooting, and although he may have had reasonable grounds to believe, and did believe, that such injury to himself could only be avoided by shooting Ireland; and that there was no safe escape from the threatened danger, still, if he *could* have safely retreated and escaped the danger, the killing was inexcusable. He is thus allowed no opportunity of judging for himself as to the possibility of escape from the danger, and although he may have acted as any rational person in view of all the facts would have done, still, if he "could have safely retreated, and thereby saved his

life and person from danger," he is not to be excused.

The law allows in defence of a man's person or property, such means as are necessary. In the selection and use of the means, he must, of necessity, exercise his own judgment. It is done at his peril; and if he goes beyond what is necessary to accomplish the object, and thus violates the law, he must abide the consequences. In the exercise of this judgment, he must act rationally; this is required, and nothing less will suffice.

In Rapp's case,^b 14 B. Monroe, 622, which was an indictment for malicious shooting with intent to kill, and where the defence was imminent danger of great bodily harm from his antagonist, this Court said that "even if Rowland did not, in fact, intend to proceed immediately to cut off Rapp's ears, or otherwise to use his knife in inflicting bodily harm upon him, still, if from his offensive language, his movements, his threats, his attitude and proximity, and from the fact that he had called Rapp into his store, and from all other circumstances developed by the evidence as existing at the time, and which may bear upon the question of intention, the jury should be of opinion that Rapp did believe, and had reasonable ground to believe, that Rowland intended to proceed immediately to the infliction of bodily harm upon him with the knife in his hand, and that he would do so, unless prevented by such act of self-defence as was then in the power of Rapp, then the shooting of Rapp was excusable on the ground of self-defence and *apparent* necessity."

In Shorter v. The People,^c 2 Comstock, 197, as stated in Wharton's Crim. Law, 466, it was said by BRONSON, J., that "when one who is without fault himself, is attacked by another in such a manner, or under such circumstances, as to furnish reasonable ground for apprehending a design to take away his life, or do him some great bodily harm, and there is reasonable ground for believing the danger imminent, that such design will be accomplished, I think he may safely act upon appear-

^b *Ante*, last case. ^c *Ante*, p. 256.

ances, and kill the assailant, if that be necessary to avoid the apprehended danger, and the killing will be justifiable, though it may afterwards turn out that the appearances were false, and there was, in fact, neither design to do him serious injury, nor danger that it would be done. He must decide at his own peril, upon the force of the circumstances in which he is placed; for that is a matter which will be subject to judicial review. But he will not act at the peril of making that guilt, if appearances prove false, which would be innocence had they proved true."

So here, if Meredith, having been assaulted, retreated to a place of safety, and procured a gun for his self-defence, appeared again on the street, going with a lawful purpose, and not for the purpose or with the intent of renewing the fight, and while thus on the street, Ireland appeared with his gun presented towards him, in a menacing attitude, and within shooting distance, and from these and other attending circumstances, then occurring, Meredith had reasonable grounds to believe, and did believe, that he was in imminent danger of great bodily harm, or loss of life from Ireland, and that the latter was then about to take his life, or inflict such bodily harm, and could only be prevented by his using such means of defence as were then in his, Meredith's, power, then the shooting by the latter was excusable on the ground of self-defence and apparent necessity.

Whether there was, in point of fact, an *actual necessity* for the resort to the means used by Meredith, was a question to be decided by him at the time; and although he may have erred in his judgment as to the existence of such necessity, still, if from all the attending facts and circumstances, he in good faith believed, and had reasonable grounds for believing, that his only safety was in using the means then in his power, to prevent Ireland from killing him, or inflicting great bodily harm, the use of such means by him was excusable.

Whether such reasonable grounds for this belief, and the belief existed, was for the jury to determine.

The instructions asked for by appellant were properly refused, and we perceive no substantial objection to the other instructions allowed; but for the error in the second instruction, as indicated, the judgment is erroneous.

It is therefore considered, that said judgment be *reversed*, and cause remanded for a new trial, and other proceedings consistent with this opinion: which is ordered to be certified to said Court.

Judgment reversed.

DYSON V. THE STATE.

[26 Miss., 362.]

*High Court of Errors and Appeals of Mississippi,
December Special Term, 1853.*

COTESWORTH P. SMITH, *Chief Justice.*
EPHRAIM S. FISHER, }
ALEXANDER H. HANDY, } *Judges.*

KILLING IN SELF-DEFENCE—BARE FEAR—OVERT ACT—REASONABLE FEAR.

1. At common law, a bare fear of danger of death or great bodily harm, unaccompanied by any overt act, indicating a present intention to kill or injure, would not warrant a party in killing another; but there must have been some actual danger at the time. [1 East, P. C., 272; 1 Hale P. C., 52. And so by statute in several States: R. S. of Ark., 1858, p. 332, § 24; Comp. Laws, Cal., 1853, p. 642, § 30; Gross' Ill. Stat., 1860, p. 172, § 14; Gen. Laws Dakota, 1862, p. 161, § 29.]

2. The Mississippi statute renders homicide justifiable "when committed by any person in the lawful defence of such person, or of his or her husband, wife, parent, child, master, mistress, or servant, when there shall be a reasonable ground to apprehend a design to commit a felony, or to do some great personal injury, and there shall be imminent danger of such design being accomplished." Hutch. Code, 957, § 3.

3. The only modification of the common law, made by this statute, consists in the justification extended to the accused, "when there shall be reasonable ground to apprehend a design to commit a felony, or to do some great personal injury," instead of the old rule, "actual danger at the time."

Held, that it was not the intention of the Legislature to dispense with the necessity of showing some *overt act* indicating a present intention to kill, or to do some great personal injury, and that the danger was imminent at the time of killing. It was intended to alter the rule of the common law, so far as to justify a party, acting conscientiously upon reasonable fears, founded upon present overt acts to all appearances hostile, although there was really no actual danger at the time. [Acc. Wesley's case, *post*; Evans' case, *post*; Head's case, *post*. And see as to *overt act*, 1 Hale P. C., 52; Rippy's case, *post*; Williams' case, *post*; Robert Jackson's case, *post*; Lander's case, *post*; Cotton's case, *post*; Harrison's case, *ante*, p. 71; Scott's case, *ante*, p. 163. And that an overt act is not necessary under certain circumstances, Philip's case, *post*; Carico's case, *post*; Young's case, *post*. And see Grainger's case, *ante*, p. 238, and note.]

4. The following principles declared by the Circuit Judge in charging the jury, are approved, and declared to be sound and salutary rules for the protection of society:

a. In order to justify killing, there must be some overt act indicating a present intention to kill the party, or to do him some great injury.

b. The danger of such design being accomplished must be imminent, that is to say, immediate, pressing, and unavoidable at the time of the killing.

c. Mere fears of a design to commit a felony, or do some great personal injury to the party, though honestly entertained, unaccompanied by any overt act indicating a design immediately to commit the felony or do the injury, will not justify the killing.

James H. Dyson was indicted in the Circuit Court of Panola county, for killing Samuel H. Nelms, and was found guilty of manslaughter in the first degree, and sentenced to fifteen years imprisonment in the State penitentiary. It was proven that Nelms was riding along the road leading from the town of Panola to his house. Jennings Estell, a boy about sixteen years of age, was the only person in company with him. When within a mile of his own house, the accused, Dyson, who had previously taken his position about fifteen yards from the road, in a sink hole in a ravine, shot Nelms with a gun as he passed, who fell from his horse. Dyson then walked up to where Nelms was lying, badly wounded, and said to Nelms, "You were going to kill." Nelms said, "I was not." Dyson then said, "You tried to get Jones to kill me." Nelms answered, he "had not." Dyson then presented his gun to Nelms' head, who turned as he lay upon the ground, and said "Good-

bye, Jennings." The gun fired and killed Nelms dead immediately, and the muzzle of the gun was so near him that the powder burnt his coat and shirt, and blistered his skin.

The defendant offered in justification of this act of killing, threats made by Nelms against him, Dyson.

The proof was in substance, that John R. Dickens, a few days before the killing, heard Dyson say to Nelms, "You made a difficulty with me, and I don't want a difficulty with you." Nelms replied, "God damn you, I don't want to have any difficulty with you either," and added, "Mr. Dyson, you have treated me damned badly."

W. B. Killebrue says, as Nelms and he were sitting in the court-house yard, Dyson came in sight; Nelms looked up and said, "Here comes the damned son of a bitch now. I will have him in less than ten days, where he won't bother me or any one else. I have got my triggers set for him." It looked to him as if Dyson might have heard what Nelms said as he passed on.

Another witness says he heard the above, and told Dyson of it; says he heard Nelms say, if Jones would attack Dyson, and Dyson denied his charges, he Nelms, would settle it. This, also, witness told Dyson.

It was also in proof, that Nelms told witness, that Turner had told him that he was in danger from Dyson, and Nelms said he would give Dyson a fair fight.

Thomas B. Turner says, Nelms told him Dyson was a damned rascal, and he would give Dyson a fair fight.

James M. Jones proved that Nelms never urged him to get into a difficulty with Dyson.

Anthony Foster and John R. Dickens and some others, proved that Nelms was a man of violent character.

The opinion of the Court contains all the instructions commented on by the Court.

The Court below having refused to grant a motion for a new trial, Dyson prayed for a writ of error to this Court.

Watson and Estelle, for plaintiff in error; *D. C. Glenn*, Attorney-General, for the State.

HANDY, J., delivered the opinion of the Court:

* * * * *

3. Again, it is urged that the Court erred in granting the 7th instruction asked in behalf of the State, and in qualifying the 2d instruction asked in behalf of the defendant. The 7th instruction is as follows:

“7th. That a bare fear that a man’s life is in danger from the violence of another, however well founded and whatever may be the character of the man feared, as that such man lies in wait to take away the life of the party, unaccompanied by any overt act indicating an intention immediately to kill such party, or to do him some great personal injury, will not warrant him in killing that other by way of precaution, if there is no actual danger at the time of killing; that both the design to commit a felony, or to do such person some great personal injury, and the imminency of the danger of such design being carried into execution, must both exist to warrant the man thus in fear of his life to kill, and that this imminency of danger means danger at the time of the killing.”

The explanation of defendant’s 2d charge is as follows:

“In explanation of defendant’s 2d charge, that although a party is not bound to retreat in some cases, and may pursue his adversary until he is out of danger; yet, this only applies where there is immediate danger of a felony, or some violence being committed by the party killed.”

Without an extended recital of the evidence on the trial, it is sufficient for the present purpose to say, that the testimony on the part of the prosecution characterized the killing of which the defendant stood charged, as premeditated, malicious, and aggravated to an extraordinary degree, the defendant lying in wait and shooting the deceased as he passed unsuspectingly along the public highway. The only evidence in justification or

mitigation of the deed consists of the proof that the deceased had had a grudge against defendant, had made threats against his life, was a violent and desperate man, and that defendant's life was in danger at his hands.* It therefore becomes necessary for the Court to declare the law arising upon the facts alleged to constitute a justification or extenuation of this deed, and I see nothing in the rulings of the Court in doing so, in violation of law or sound policy.

By the rules of the common law, in order to justify the killing, a bare fear of death or great bodily harm, unaccompanied by any overt act indicating a present intention to kill or injure, would not warrant a party in killing another. There must have been actual danger at the time. 1 East Cr. Law, 271, 272.

Our laws render the homicide justifiable, "when committed by any person in the lawful defence of such person, or of his or her husband, wife, parent, child, master, mistress or servant, when there shall be a reasonable ground to apprehend a design to commit a felony or to do some great personal injury, and there shall be imminent danger of such design being accomplished." Hutch. Code, 957, § 3.

The only modification of the common law made by this statute, consists in the justification extended to the accused, "when there shall be reasonable ground to apprehend a design to commit a felony or to do some great personal injury," instead of the old rule, requiring "actual danger at the time." But it was not the intention of the legislature to dispense with the necessity of showing some overt act, indicating a present intention to kill or do some great personal injury, and that the danger thus indicated was imminent at the time of killing. It was intended to alter the rule of the common law so far as to justify a party acting conscientiously upon reasonable fears, founded upon present overt acts to all appearances hostile, although there was really no actual danger. If this were not so, what is to constitute

* For a similar state of facts, see Lander's case, *post*.

“reasonable grounds of apprehension?” By what limit is this dangerous rule to be defined? Must this reasonable ground of apprehension be founded upon a present and immediate emergency, unavoidable to the party, or may it consist of mere fear, which, though reasonable, all danger may be avoided? Are we to refer the reasonableness of the grounds of apprehension to the judgment or feelings of the party implicated, and not to a just and dispassionate standard? The peace of society and the security of life require that “the reasonable grounds of apprehension,” as justifying homicide, should be limited as strictly as possible to the right of self-defence, and this seems to have been properly regarded by the Court below, in the instructions under consideration.

In substance, the entire instructions in the case, as given by the Court, contain the following principles:

First. That in order to justify killing, there must be some overt act indicating a present intention to kill the party, or to do him some great personal injury.

Second. That the danger of such design being accomplished must be imminent, that is to say, immediate, pressing, and unavoidable at the time of killing.

Third. That mere fears of a design to commit a felony or to do some great personal injury to the party, though honestly entertained, unaccompanied by any overt act indicating a design immediately to commit the felony or do the injury, will not justify the killing.

And this exposition of the law meets my approbation as the law of this case, and the sound and salutary rule for the protection of society.

* * * * *

Judgment affirmed.

NOTE.—The learned Judge in this case, has certainly misconceived the common law rule as it is generally understood in this country, and probably as it is understood in England. The Mississippi statute, above quoted, is simply in affirmance of the rule indicated in *Levett's case*, Cro. Car., 538, and in *Meade's case*, *post*; and declared in *Selfridge's case*, *ante*, p. 18; *Shorter's case*, *ante*, p. 256; *Logue's case*, *ante*, p. 269; and many others. See note to *Shorter's case*, *ante*, p. 256.

COTTON V. THE STATE.

[31 Miss., 504.]

High Court of Errors and Appeals of Mississippi, October Term, 1856.

COTESWORTH P. SMITH, *Chief Justice.*
 EPHRAIM S. FISHER,
 ALEXANDER H. HANDY, } *Judges.*

**HOMICIDE UPON APPEARANCES OF DANGER—IMMINENCE OF THE DANGER—
 ARMING WITH DEADLY WEAPON AND SEEKING AFFRAY—NECESSITY OF
 KILLING, A QUESTION FOR JURY.**

1. Under the Mississippi Statute, Hutch. Code, 957, reasonable ground to apprehend a design to commit a felony or to do some great personal injury, and imminent danger of such design being accomplished, must both co-exist at the same time to make a killing justifiable self-defence. [See note to Shorter's case, *ante*, p. 268.]

2. What is reasonable ground to apprehend such design must always be as much, or indeed more, a question of fact for the jury, than a question of law for Court. [See Harris' case, *ante*, p. 276; and citations.]

3. As part of the means of arriving at the truth of this fact, the peculiar character of the hostile party is as much a fact for the consideration of the jury as any other fact in issue; and the jury must determine from the hostile demonstrations whether there was such danger of *this party's* executing his felonious design, as to justify the party in killing. [See Tackett's case, *post*, and those following it.]

4. Although there may have been no actual danger at that very moment of time, the question in such a case is, whether by delay, the danger is not increased.

5. The only general rule which a Court can with any safety lay down on this subject is, that whether the danger must be immediate and unavoidable at the time of the killing to make the killing justifiable self-defence, must depend on the facts and circumstances of each particular case; and of these the jury must be the judges. [Acc. Robert Jackson's case, *post*; Patten's case, *post*.]

6. It was erroneous to instruct the jury that if the accused was armed with a deadly weapon, and sought and brought about the difficulty with the deceased, and killed the deceased in the difficulty with such weapon, he is guilty of murder; because the fact of a man's being armed with a deadly weapon, though he may be the aggressor in a difficulty, amounts to nothing, unless he provided himself with the weapon, with a view to using it, if necessary, in overcoming his adversary. [See Head's case, *post*.]

7. In such a case, the party having commenced the difficulty, he can only use his weapon in self-defence or take the life of the opposite party, when the danger is immediate and impending or unavoidable. [And he will not be excused in taking life, until he has used every honest endeavor to withdraw from the combat. Stoffer's case, *ante*, p. 213, and note; Riley and Stewart's case, *ante*, p. 155.]

Error from the Circuit Court of Yazoo county, Hon. E. G. HENRY, J., presiding.

John Cotton, the plaintiff in error, was indicted in the Circuit Court of Yazoo county for the murder of one John Smith. At the February term, A. D. 1854, of said Court, he was tried and convicted of murder, and sentence of death pronounced against him, which judgment the High Court of Errors and Appeals, on writ of error, reversed, and awarded the prisoner a new trial. At the November term, A. D., 1855, of said Court, the prisoner was again tried and convicted, and judgment of death pronounced upon him. From this last judgment, he prosecutes this writ of error.

The evidence for the State was in substance as follows: Greenberry Anderson stated that in July, A. D., 1852, he, with several others, was in the store of Frawley, in Yazoo City, in company with John Smith, the deceased. That the prisoner came in the room and he and Smith exchanged salutations. Prisoner then told Smith that he wanted to speak with him, to which Smith replied "certainly." Prisoner then walked out and Smith followed; both then turned down the street, and went about sixteen feet from the door of the store-room of Frawley. Witness soon afterwards heard Smith say, "I did not say it." Cotton replied "that he believed Smith was a liar, and did say it, and that he could whip him." Smith then said, "If you think so, 'pitch in.'" These words were spoken in an angry manner, and witness thinking there was about to be a fight, went out into the street, and immediately heard a blow struck by one of the parties, but he could not tell which one of them struck it. Smith was standing on the sidewalk with back towards the houses, and the prisoner was walking backwards across the street, in a direction from Smith.

Witness then approached to within a few feet of the parties, on a line which would have led between them; he then stopped; he then heard the prisoner say several times, "draw it." Witness looked at Smith "but did not see him draw anything." While prisoner was saying "draw it," witness saw him pull a pistol out of his pocket and shoot Smith. This was about dark, and in Yazoo county, where Smith died on the same night. Witness went up to Smith after he was shot, and carried him across the street and laid him down in a house; he saw no weapons upon him. Smith had blood in his mouth, which looked as if he had been struck.

Upon cross-examination, witness stated that it was very dark that night; there was no moon, and it was a little cloudy; that it was so dark that he could not distinguish Cotton, except by his voice; that he could not see what Cotton was drawing from his pocket, until the pistol was fired; that he was nearer to Cotton than Smith; that Smith was standing with his left side towards witness, and that he could not see his right hand, and did not know what he was doing with it; that Cotton was going backwards with his face towards Smith, from the time witness first saw him, until he fired; that it was not more than two or three minutes from the time Cotton and Smith left the store until the pistol was fired.

Dr. Leake, for the State, described the character of the wound, and stated that it caused death.

This was all the evidence, the prisoner offering none.

The second instruction given on behalf of the State was as follows:

That if the jury believe from the evidence, that the accused killed Smith, the deceased, and no accompanying circumstances appear in the evidence to excuse the act, the law presumes the killing was done maliciously, and that they will find him guilty of murder.

The other instructions on behalf of the State which are necessary to be noticed, are fully set out in the opinion of the Court.

The first, second and third instructions on behalf of

the prisoner, with the modifications of the Court, are as follows:

1. That unless the jury believe from the evidence that the prisoner killed John Smith from a premeditated design, formed beforehand to effect his death, or the death of some other person, they cannot find him guilty of murder.

The Court refused to give this instruction as asked, but added to it these words, "but if it was premeditated, the law does not regard how short beforehand the time was;" and with this addition, gave it.

2. That to kill a human being with premeditated design, the mind must have acted in regard to the killing before the killing was committed; and the mind must have settled down resolved and determined to kill and murder; and that the killing was done with a deliberate mind and formed design of so doing.

Which the Court refused to give as asked, but added thereto the same modification as the one to the first instruction, and then gave it.

3. That if the jury believe that Cotton killed Smith on a sudden quarrel, without a premeditated and formed design so to do, they must not find him guilty of murder.

To which the Court added, "unless he sought the quarrel, and used a deadly weapon;" and with this addition, gave it.

To all which modifications and additions, so made by the Court, the prisoner excepted.

Other instructions were asked by the prisoner, and given by the Court, but it is not necessary to set them out.

W. E. Pugh, for the prisoner; *D. C. Glenn*. Attorney-General, for the State.

FISHER, J., delivered the opinion of the Court:

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Next as to the instructions of the Court. It is said that the second instruction limited the investigation of the jury to the crime of murder, or to the defence of excusable homicide and that they were not permitted to

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show that in the perpetration of the deed he acted under a necessity, either actual or apparent, forced upon him by the party killed; for if such were not the case, his defence can avail him nothing, or certainly not further than to mitigate the crime. The very defence itself presupposes danger to the party's life or person, except in cases where he may act in defence of the life and person of another. When he assumes the defence, he at the same time undertakes to establish the danger, or what is the same thing, what appeared to be the danger. The question presented by this instruction is, in what manner must the danger exist, to justify the party in taking the life of his adversary? The law says that there must be reasonable ground to apprehend a design to commit a felony, or do some great personal injury, and imminent danger of such design being accomplished. Hutch. Code, 957. Reasonable ground to apprehend the design, and imminent danger of its accomplishment, must both exist at the same time. What is a reasonable ground to apprehend such design, must always be as much, or, indeed, more a question of fact for the jury, than a question of law for the Court; for while it is true in regard to inanimate objects, where the fact is the same, and law must also be the same; this is not true, even as a general rule, in this class of cases. The hostile demonstrations of two men may be in every respect the same; yet the party threatened may be placed in imminent peril from the one, and feel not the slightest apprehension from the other. A design to commit a felony, or to do some great personal injury, may be apprehended in the one case, and it may have no existence whatever in the other. One may excite fear and the greatest apprehensions of danger, while the same demonstrations on the part of another, may only excite mirth and ridicule. The question is in both cases the same—was there imminent danger to life or to the person of the party threatened? As part of the means of arriving at the truth of this fact, the peculiar character of the hostile party is as much a fact for the

consideration of the jury as any other fact in issue; and the jury must determine from the hostile demonstrations, whether there was such danger of *this party's* executing his felonious design, as to justify the party killing. In doing so, though there may have been no actual danger from the deceased at that very moment of time, the question in such case is, whether by the delay the danger is not increased. As, for instance, suppose the party threatened is in the upper story of a building, and the ground to apprehend the design to take his life, or to do some great personal injury, is there for the first time discovered, and his adversary leaves for the purpose of arming himself, and taking a favorable position at the foot of the stairs, with the known and avowed purpose of committing the deed while the party is descending to make his way out of the building, would a few moments, or even ten minutes make any difference in such a case? The very act of allowing the hostile party to escape might prove fatal to the party threatened, and deprive him of all means of self-defence. It may be said that this is putting an extreme case. I grant it. It nevertheless serves the purpose for which it was intended, of showing the impropriety of laying down a rule, within the operation of which the Court declares a person, without regard to the peculiar circumstances of the case, must bring his defence in order to be successful. Whether the danger must be immediate or unavoidable at the time of the killing to justify the party in the act, must depend upon the facts and circumstances of the case. This is the only general rule which a Court can with any safety lay down upon the subject.

The jury must, of necessity, be the judges, whether

*It was the fortune of the learned Judge who delivered the opinion in this case, afterwards to sit as circuit judge and try a case, where, according to the theory of the defence, the facts were somewhat similar to the hypothetical case above put. We allude to Evans' case, *post*. In that case (according to the claim of the defence) the deceased was when shot, in the act of running into the house to get a gun for the purpose of engaging in mortal combat with the accused. The learned Judge's charge in that case seems to be quite a departure from his views in this case.

reasonable ground to apprehend the design contemplated by the statute existed, and whether there was imminent danger, from all appearances, that such design would be executed. In arriving at their conclusion on this subject, they are expected to avail themselves of such knowledge as they possess, in regard to human transactions, from their intercourse with society. The right of self-defence is not derived from the law. All the law attempts to do on the subject is, to prescribe the rules of caution and prudence to be observed by persons before exercising the right, by ascertaining whether the danger exists, and whether it is imminent; and, as before remarked, whether it must be immediate and impending at the very time of killing, will depend upon the facts and circumstances surrounding the transaction.

But it is not necessary to pursue this subject further; and we proceed next to notice the seventh instruction, as follows: "That if the accused was armed with a deadly weapon, and sought and brought about the difficulty with the deceased, and killed the deceased in the difficulty with such weapon, he is guilty of murder." The fact of a man being armed with a deadly weapon, though he may be the aggressor in a difficulty, amounts to nothing, unless he provided himself with the weapon, with a view to using it, if necessary, in overcoming his adversary. It may be a man's habit, as it unquestionably is his right, under the law of this State, to carry a deadly weapon; and whether he is permitted to use it or not, must depend upon the nature of the difficulty in which he may be involved. A man may begin a difficulty intending to inflict no violence, or next to none, on his antagonist, and may be so closely pressed as to be forced to use his weapon in self-defence. The rule is thus stated by Blackstone: "If the slayer has not begun the fight, or, having begun, endeavors to decline any further struggle, and, afterwards being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide, excusable by self-defence." 4 Bla. Com., 184. In such case, the party having commenced the difficulty, he

can only use his weapon in self-defence or take the life of the other party, when the danger is immediate or impending or unavoidable.

The first and second instructions asked on behalf of the prisoner, simply announce as a legal proposition, that to make out the crime of murder, it must appear that the prisoner "acted from a premeditated design, formed beforehand, to effect the death of the deceased." These instructions ought to have been given as asked, as they were entirely free from objection. The Court may modify an instruction to make it correct, but if it be already correct, it ought to be given as asked by counsel.

The qualification by the Court, made to the third instruction is clearly erroneous. The instruction is, in substance, that if Cotton killed Smith, not in pursuance of a premeditated design, but on a sudden quarrel, the crime of murder is not made out. The modification made is "unless Cotton sought the quarrel, and used a deadly weapon." The question was, whether malice prompted the accused to kill. He interposed as his defence, by the instruction, "*no design to kill*, and that the killing was on a sudden quarrel." The Court say to him that this is no defence, not even to mitigate the crime, if he sought the quarrel and used a deadly weapon. Now, he may have done both without being guilty of murder; for, he may not by seeking the quarrel, have intended the slightest personal injury to the deceased, and he may, from sudden provocation, have used his weapon, or he may have been forced to do so in self-defence, although he was the aggressor in the quarrel.

The modification amounts to this, that, although there must be a formed design to take life, to constitute murder; yet such design is not necessary where the party killing seeks the quarrel and uses a deadly weapon.

There must be proof of malice in some form; the seeking of the quarrel and the using of the deadly weapon, may be evidence for this purpose. But this is what the defendant below was endeavoring to meet, by showing no design to take life, because the killing occurred on a

sudden quarrel. The modification virtually declares this to be no defence, if the party sought the quarrel.

* * * * *

Judgment reversed, venire de novo awarded, and cause remanded.

WESLEY v. THE STATE.

[37 Miss., 327.]

*High Court of Errors and Appeals of Mississippi,
October Term, 1859.*

COTESWORTH P. SMITH, *Chief Justice.*
ALEXANDER H. HANDY, } *Associate Justices.*
WILLIAM L. HARRIS, }

JUSTIFIABLE HOMICIDE—IMMINENCE OF THE DANGER—A BARE FEAR NOT SUFFICIENT—KILLING OF OVERSEER BY SLAVE—CHARACTER OF OVERSEER FOR CRUELTY NOT ADMISSIBLE—CHARGING UPON WEIGHT OF EVIDENCE NO GROUND OF REVERSAL, WHEN.

1. In trials for homicide, evidence of the character for violence of the person slain is not admissible, except when drawn into *res gestæ* by testimony tending to show that the killing was done under an apprehension on the part of the defendant of immediate death, [or great bodily harm], at the hands of the deceased. [See Tackett's case, *post*, and those following it.]

2. The rules which, in trials for homicide, exclude evidence of the general character of the deceased, apply with greater force when it is sought to introduce evidence in regard to the specific acts of the deceased, or to prove the general tenor of his conduct for a specified time, and in relation to particular subjects.

3. A slave cannot show, in defence of a homicide by him of his overseer, the general management of the deceased on the plantation, with reference to violence and cruelty, or specific acts of unmerciful cruelty committed by him on other slaves, while acting as such overseer. [See as to character of deceased, Tackett's case, *post*, and those following it.]

4. To make a homicide justifiable on the ground of self-defence, the danger must be either actual, present and urgent, or the slayer must have reasonable ground to apprehend a design on the part of the deceased, to commit a felony, or to do him some great bodily harm, and that there is

imminent danger of such design being accomplished; and hence the mere fear, apprehension or belief, however sincerely entertained by one person, that another designs to take his life, will not justify the former in taking the life of the latter. [Compare Shorter's case, *ante*, p. 256, and note, and Sullivan's case, *ante*, p. 65.]

5. A man may have a lively apprehension that his life is in danger, and believe that the grounds of his apprehension are just and reasonable; but if he act on them, and take the life of a human being, he does it at his peril. He is not the final judge, whatever his apprehension or belief may have been, of the reasonableness of the grounds upon which he acted. That is a question which the jury alone are to determine. [Acc. Evans' case, *post*; Harris' case, *ante*, p. 276, and cases cited.]

6. The following charge is not liable to the objection that it instructs the jury on the weight of evidence, viz.: "If a party, through mere fear of his life, there being no real or apparent danger, kill another, it is not justifiable." [See as to the principle stated, note to Grainger's case, *ante*, p. 242.]

7. It is the peculiar province and exclusive right of the jury, to weigh the evidence and determine the facts of a case submitted to their consideration; and it is error for the Court to instruct them upon the weight of evidence, or to assume in the charges given that any material fact is proven; but this Court will not reverse a judgment for a violation of this rule, if it appear that the fact assumed as proven by this Court, was so clearly established by the evidence, that there could be no room for the jury to doubt on that subject.

The prisoner, a slave, was indicted for the murder of William G. Ford. He pleaded not guilty and the cause was submitted to a jury

On the trial, Mrs. Ford, the widow of the deceased, proved that her husband had been overseeing for Walker, the owner of the prisoner, for about one month previous to his death; that about sunrise on Sunday morning, the 1st of August, A. D., 1858, the deceased brought a negro man (who is admitted to be the prisoner) to the door of the smoke-house, and called for the key, and for a strap with which he usually tied negroes. These were brought to him. He then tied the prisoner and put him in the smoke-house, and locked the door, and then went into the dwelling-house. He did not appear angry or excited. In a very short time, not exceeding five minutes, witness wanted to get out some meat for breakfast, and asked deceased to go with her to the smoke-house, which he did. Whilst witness was whetting a knife at the corner of the smoke-house and about

six yards from the door, deceased opened the door, and as it opened, witness heard a noise, and turning around, she heard the deceased fall over some cotton baskets that were near the door. The prisoner sprang so rapidly past her from the smoke-house, that she could not identify him. He immediately ran off. Witness then saw deceased struggling, and ran to him and called for assistance. She told some of the negroes to go for a doctor, but they said they did not know where the doctor lived. She then sent her son for the doctor. Deceased was then assisted into the dwelling-house. He had a very bad wound on the right side of his head, and died that day about one o'clock.

It was in proof that the prisoner, immediately after he inflicted the blow, ran to his owner's house, about one half mile distant, and not finding his owner at home, left, and soon afterwards, being hunted with dogs, he went again to the owner's house. The wound inflicted was proven to be a fracture of the skull, and it appeared to be made with a stick, or some such instrument. There is some doubt as to whether the wound was inflicted by a hexagonal piece of timber, of sufficient size, in the language of one of the witnesses, "to knock a bull down with," or a paddle some three feet long, and of sufficient thickness to inflict death, or a brick-bat. The prisoner, soon after his arrest, stated he did not know with what instrument he struck the blow, but thought it was a piece of timber "like a hoe-helve."

It was also in proof for the defence, by three slaves, that just immediately preceding the carrying of the prisoner to the smoke-house, as testified to by Mrs. Ford, the deceased had conceived that the prisoner had not executed properly a command to curry a mule, had become very much enraged, and had beaten with his fist, and kicked the prisoner with great violence, and on starting to the house with him, told the prisoner "that he would know how to curry a mule when he had done with him."

The prisoner's character was proven to be that of an

obedient and submissive slave. The general character of the deceased was also in evidence. He was proven to be cruel and violent in his treatment of slaves; and one witness who had employed him as overseer, and had discharged him for cruelty to his slaves, stated that his violence to slaves seemed to be a constitutional infirmity.

The exception taken to the rejection of evidence offered by the prisoner, is fully set out in the opinion, as well as the instructions given and refused, which were made the subject of discussion in this Court.

The prisoner was convicted, and upon his motion for a new trial being overruled, he excepted, and sued out this writ of error.

Sale & Phelan, for the plaintiff in error; *T. J. Wharton*, Attorney-General, for the State.

SMITH, Ch. J., delivered the opinion of the Court:

The plaintiff in error was indicted and tried for the murder of one William G. Ford, and convicted. A motion was made in the Court below to set aside the verdict, and for a new trial, which was overruled; whereupon the defendant excepted, and has brought the cause before us by a writ of error. The bill of exceptions taken to the judgment on the motion for a new trial, contains the evidence in the cause, and presents the grounds of error relied on for a reversal of the judgment.

A detailed statement of the evidence is unnecessary, as it will be quite sufficient to refer to only such parts of it as may be requisite to a proper comprehension of the questions raised by the assignment of errors, and discussed by counsel.

1. The first exception relates to the exclusion of certain evidence offered by the prisoner.

The deceased was, at the time of the alleged homicide, the overseer of one John A. Walker, and as such, had under his control and management the accused, who was a slave and the property of the said Walker. The commission of the homicide by the prisoner, and the facts

and circumstances immediately attending the perpetration of the deed, are distinctly proved. The testimony of Mrs. Ford, the only witness, as it appears from the record, who was present at the killing, shows very clearly that the prisoner when he slew the deceased, was in no present danger either real or apparent; and that there was not reasonable ground to apprehend that the deceased meditated taking the life of the accused, or designed to do him some great bodily harm, and there was imminent danger of such design being accomplished.

On this state of evidence, the prisoner offered to prove the general management of the deceased on the plantation where he was the overseer, "with reference to violence and cruelty," and also to prove "specific acts of unmerciful severity," committed by him while acting as such overseer, which had come to the knowledge of the witness subsequently to the killing. This evidence was excluded, and the prisoner excepted. And this ruling of the Court is assigned for error.

In the estimation of the law, to murder the most wicked is as great a crime as to murder the best and most innocent of the human species. Hence, as a general rule, it is held by all the Courts, that on the trial of an indictment for homicide, evidence to prove that the deceased was well known and understood as well by the accused as others, to be a quarrelsome, vindictive and dangerous man, is inadmissible. When, however, the character of the deceased is involved in the *res gesta*, evidence in regard to it may be introduced. As when it is shown that the accused had reasonable ground to apprehend immediate danger to his life from the deceased, the character of the deceased in connection with previous threats, etc., may be given in evidence as explanatory of the motives upon the defendant's action. Am. C. L. 235.*

The Courts in North Carolina, in Alabama and Tennessee, while acknowledging the general doctrine as above stated, have gone a step farther, and hold, that

*See Whart. Crim. Law, 6th ed., §841, vol. 1.

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The Courts in North Carolina, in Alabama and Tennessee, while acknowledging the general doctrine as above stated, have gone a step farther, and hold, that

*See Whart. Crim. Law, 6th ed., §641, vol. 1.

where the homicide has been committed under such circumstances as to create a doubt as to the character of the offence, the general character of the deceased may sometimes be given in evidence. *The State v. Tackett*,^b 1 Hawks., 210; *Wright v. The State*, 9 Yerger, 342; *Quesenberry v. The State*,^c 3 Stew. & Port., 315. As in the case last cited, where it was held that "if the circumstances of the killing were such as to leave any doubt whether the defendant had not been more actuated by the principle of self-defence than that of malice, it would be proper to admit any testimony calculated to illustrate to the jury the motive by which he had been actuated."

The principle here recognized is in conflict with the generally received doctrine on the subject, which, as we have seen, excludes evidence in regard to the general character of the deceased, except when it is involved in the *res gestæ*. But without asserting that extreme cases might not be presented, in which evidence of the general vindictive, revengeful and dangerous character of the party slain might properly be allowed to go to the jury, as explanatory of the state of defence in which the defendant placed himself, although not strictly a part of the *res gestæ*; if the question here presented were tested by the doctrine laid down in the cases cited, it seems clear that the Court did not err in ruling out the evidence. For here there is no pretence for the assumption that the homicide was committed under such circumstances as create a doubt as to the character of the offence. And it is clear that the reasons upon which the rule in reference to the admissibility of evidence as to the general character of the deceased is founded, apply with greater force where it is sought to introduce evidence in regard to specific acts of the deceased, or to prove the general tenor of his conduct for a specified time, and in relation to particular subjects.

But the real question involved in the exception is not whether, in prosecution for murder, it is competent,

^b *Post.* ^c *Post.*

under any circumstances, for the defendant to prove the general revengeful and dangerous character of the deceased. It is whether the general management of slaves, on a plantation, by the deceased, as characterized by violence and cruelty, and whether specific acts of severity and cruelty committed by him, while acting in the capacity of an overseer, may be proved as circumstances going to justify a homicide, by a slave, committed upon him while acting as such overseer.

Whether considered abstractly, or in reference to the facts immediately connected with the killing in this case, it is manifest that the validity of this position rests upon the doctrine, not heretofore announced in this Court, that in an indictment for a homicide committed by a slave upon his master or overseer, the violent and cruel character of the overseer or master, in the government of his slaves, and specific acts of severity and cruelty committed by such overseer or master, may be considered by the jury in determining the guilt or innocence of the accused, although the killing may be proved to have occurred under circumstances which show that the party charged was at the time in no present danger, real or apparent; and that he had no reasonable ground for apprehending danger to life or limb from the deceased, or that the deceased designed to take his life or do him some great bodily harm, and there was imminent danger of such design being accomplished. In other words, that a slave charged with the murder of his master or overseer, may excuse or justify the deed upon the ground that, being about to be chastised by his master or overseer, or being apprehensive that he would be punished for some real or imputed delinquency; from the known violent and cruel character of the deceased in the management of slaves, and from the fact that he had been guilty of particular acts of great cruelty upon other slaves under his charge, he had good reason to apprehend, and in fact, did believe that some great bodily harm would be inflicted upon him, or that his life would be taken.

It is scarcely necessary to say that this proposition is utterly untenable. It lays down a rule, which, if recognized by the Courts, would produce the most disastrous consequences. If the slave, when he is about to be chastised, or has just reason to apprehend that he will be subjected to cruel and unmerited punishment, be informed, that in order to escape, he may innocently slay his master or overseer, if he really believes that by the apprehended punishment his own life will be taken or greatly endangered; and that to make good his defence in a Court of justice, it will be sufficient to prove the general violent and cruel conduct of the deceased in the government of slaves; the slave population of the State will be incited to insubordination and murder, and the life of the master exposed to destruction, either through the fears or by the malice of his slaves.

But the principle contained in the proposition, when applied to homicides committed by white persons is equally untenable.

To make a homicide justifiable on the ground of self-defence, the danger must be either actual, present and urgent, or the homicide must be committed under such circumstances as will afford reasonable ground to the party charged, to apprehend a design to commit a felony, or to do him some great bodily harm, and that there is imminent danger of such design being accomplished. Rev. Code, 601, §34. Hence, the mere fear, apprehension or belief, however sincerely entertained by one man, that another designs to take his life, will not excuse or justify the killing of the latter by the former. Where the danger is neither real nor urgent, to render a homicide excusable or justifiable within the meaning of the law, there must, at the least, be some attempt to execute the apprehended design; or there must be reasonable ground for the apprehension that such design will be executed, and the danger of its accomplishment imminent. *State v. Scott*,^a 4 Iredell, 409. A party may have a lively apprehension that his life is in danger, and believe that

^a*Ante*, p. 163.

the ground of his apprehension is just and reasonable; but if he act upon them and take the life of a human being, he does so at his peril. He is not the final judge, whatever his apprehension or belief may have been, of the reasonableness of the grounds upon which he acted. That is a question which the jury alone are to determine.

2. The next objection applies to the sixth charge granted in behalf of the State. The charge is in these words: "If a party through mere fear of his life, there being no real or apparent danger, kill another, it is not justifiable."

In the argument of the exception to this instruction, it was contended, first, that the charge was erroneous, because it admits or assumes that the homicide in question was, in point of fact, committed through mere fear; and, second, because it denies that a killing through mere fear is justifiable. If counsel are correct in their construction of the charge, it is certainly erroneous, but not for the reason assigned.

It would have been error if the Court had said to the jury, the prisoner on trial committed the alleged offence through fear of his life; but a killing from mere fear, where the party killing is in no danger, either real or apparent, is murder; in other words, a homicide, where the party killing is in no danger, actual or real, and has no reason to apprehend danger, is murder. It would in effect, be a command to the jury to convict the prisoner.

Such, however, is certainly not the proper construction of the charge. It lays down a principle of law for the guidance of the jury in the most abstract form, leaving them perfectly free to weigh the evidence, and to determine whether or not the homicide was committed through mere fear of life. There is, hence, no objection to the charge, unless the position be tenable that a killing, through fear or apprehension that the party's life is in danger, where, in point of fact, there was no real or actual danger, and no reason to apprehend any is justifiable.

What we have said in reference to the first assignment of errors is a sufficient answer to this objection.

3. The next error assigned is, that the Court erred in giving the fourteenth instruction requested by the district attorney, which is in these words: "That whether the defendant at the time he struck the blow, intended to kill the deceased, or only intended to knock him down to effect his escape, in either case he is guilty of murder, if he used such means as were calculated to endanger the life of the deceased, or to do him some great bodily injury."

The objection to this instruction is that it assumes as proved, an important fact in the case; and hence, is a charge upon the weight of evidence.

It is the peculiar province and exclusive right of the jury to weigh the evidence, and to determine the facts of a case submitted to their consideration. And the law is careful to guard against any invasion of their authority by the Court. It is, hence, error for the Court to instruct the jury as to the weight of the evidence before them, or to charge that any fact material to the issue was proved. For the same reason it is improper for the Court to assume as proved, any facts involved in the issue, and make such assumption the basis of an instruction; for such an act would, in effect, be a charge upon the weight of evidence. But it is not for every error committed by the Circuit Courts in charging or in refusing to charge the jury, that this Court will reverse. It is only after an examination of the whole record, and when it appears that the party complaining has either been injured or may have been injured by an erroneous instruction, that this Court will interpose and correct the error.

In the case before us, the fact that the blow was given by the defendant, which caused the death of the deceased was clearly and distinctly proven. Not a particle of evidence was offered which raised the slightest doubt as to the hand which dealt the fatal blow. It was certainly

not a controverted fact, or one about which it was possible for the jury to doubt. Under these circumstances, it cannot be asserted that the jury were misled, and therefore that the defendant was injured by the instruction. On the contrary, it may with certainty be affirmed that, in respect to the agent in the homicide, the jury were not and could not have been influenced by the instruction. Such being the case, it would be to defeat instead of promoting the true purpose of the law, to set aside the verdict for this cause.

* * * * *

Judgment affirmed.

JOHN EVANS v. THE STATE.

[44 MISS., 762.]

Supreme Court of Mississippi, October Term, 1870.

EPHRAIM G. PEYTON, *Chief Justice.*

HORATIO F. SIMRALL, } *Associate Justices.*
JONATHAN TARBELL, }

**HOMICIDE IN SELF-DEFENCE—THREATS, WHEN ADMISSIBLE IN EVIDENCE
—APPARENT DANGER—IMMINENT DANGER—VOLUNTARILY ENGAGING
IN MORTAL COMBAT.**

1. Threats, however deliberately made, do not justify an assault and battery, much less the taking the life of the party making them. [Acc. Dyson's case, *ante*; Rippy's case, *post*; Williams' case, *post*; Lander's case, *post*; Johnson's case, *post*; Robert Jackson's case, *post*; and others.]

2. Evidence of threats previously made by the deceased, and communicated to the defendant, is not admissible in trials for homicide, unless the testimony show that at the time of the killing, the deceased had sought a conflict with the accused, or was making some demonstration towards the accomplishment of such threats. [Acc. Hays' case, *post*. Contra, Pridgen's case, *post*; Robert Jackson's case, *post*; Little's case, *post*.]

3. Where the defendant, being armed with a gun loaded with buckshot, invited the deceased to come out of the field where he was at work, and

while the deceased was approaching his cabin in his shirt sleeves, the defendant deliberately shot and killed him, it was held not error to exclude evidence of a threat made sometime previously by the deceased, that if the prisoner fooled with him, he would kill him. Such threat would have no influence on the verdict, unless there was evidence tending to show that the deceased at the time of the killing, sought the conflict, or was making some demonstration towards the accomplishment of his threat. [Acc. Hays' case, *post*, and citations; Head's case, *post*. Contra, Pridgen's case, *post*; Robert Jackson's case, *post*; Little's case, *post*.]

4. To shoot down another on sight, who at the time is making no hostile demonstration dangerous to life and limb, is in law murder; because the law tolerates no justification and accepts no excuse for the destruction of human life, on the plea of self-defence, except that the death of the adversary was necessary, or apparently so, to save his own life, or his person from great bodily injury, and there shall be imminent danger of such design being accomplished. [Acc. Scott's case, *ante*, p. 163, and cases there cited.]

5. The danger to life or of great personal injury, must be imminent, present at the time of the killing, real or apparent, and so urgent that there is no reasonable mode of escape except to take life. [Acc. Wesley's case, *ante*, last case, and all the cases.]

6. But the term "apparent danger" is to be understood as meaning such overt, actual demonstration, by conduct and acts, of a design to take life or do some great personal injury as would make the killing apparently necessary to self-preservation. As if A., who had threatened to kill B., presented at him a gun in a shooting posture and within range, and B. should thereupon kill A., he would be justified, although it should afterwards turn out that the gun was not loaded. The careful statement of this principle in Wesley v. The State, *ante*, last case, approved.

7. If a man invites another to mortal combat, he who gives the invitation being already armed, cannot lawfully shoot the other before he has armed himself, and whilst going to a place where his weapon may be, although the deceased had formed the purpose to use his weapon on his return.

8. A party may have a lively apprehension that his life is in danger, and believe that the ground of his apprehension is just and reasonable; but if he act upon such belief, and take the life of a human being, he does so at his peril. He is not the final judge, whatever his apprehension or belief may have been of the reasonableness of the grounds on which he acted. [Quoting from Wesley's case, *ante*, last case.]

9. In every case where homicide is attempted to be justified on this ground, it must appear from the testimony in the cause, that the danger was *urgent, present* and *imminent*, and that no reasonable mode of warding it off or escaping from it existed, except to take life. [See note to Neeley's case, *ante*, p. 104; and see the 5th proposition *supra*, where the rule is correctly qualified by the words, "real or apparent."]

10. The mere apprehension or belief that the deceased is about to arm himself and return to enter into a combat, does not show a present and imminent danger. If he arms himself to engage in a combat with deadly weapons, on an invitation accepted, or upon mutual agreement, and en-

gages in it, it will be murder in him who provoked the fight or in him who accepted it, if either be slain. [Acc. Hill's case, *ante*, p. 199.]

Error to the Circuit Court of De Soto county. FISHER, J.*

It seems that the prisoner and deceased were plantation negroes; that they had had a difficulty; that the deceased had made threats of death against the prisoner; that the prisoner, being armed with a gun, invited deceased, who was at work in the field, to come to the cabins and they would have it out; and that while the deceased was approaching his cabin, apparently with the intention of getting his gun, the accused shot and killed him.

The following charges were given for the State:

1. To make a homicide justifiable, on the ground of self-defence, the danger must be either actual, present and urgent, or the slayer must have reasonable grounds to apprehend a design on the part of the deceased to commit a felony, or to do him some great bodily harm, and that there was imminent danger of such design being accomplished; and hence the mere fear or apprehension, or belief, however sincerely substantiated, by one person, that another designs to take his life, will not justify the former in taking the life of the latter.

2. Every killing with a deadly weapon is presumed to be malicious, and amounts to murder, until the contrary appears from circumstances of alleviation, excuse or justification; and it is incumbent on the accused to make out such circumstances of excuse, alleviation or justification, to the satisfaction of the jury, unless they should arise out of the evidence in the case produced against, or arise out of the whole evidence in the case.

3. If the jury believe from the evidence that the defendant armed himself with a deadly weapon, for the purpose of seeking a difficulty with the deceased, and

* Judge EPHRAIM S. FISHER, who tried this case at *nisi prius*, was formerly a Judge of the High Court of Errors and Appeals. He delivered the opinion of the Court in Cotton's case, *ante*, p. 310, and also sat in Dyson's case, *ante*, p. 304.

intended only to use the same, provided it became necessary during the difficulty, in order to save his own life, and that being so armed, with such intention, he sought and brought on a difficulty with the deceased, and killed him with said weapon, then said killing is murder, though at the moment it took place the defendant was in actual apparent danger of losing his own life.

4. Was a charge respecting the duello. If the jury believe that the defendant challenged the deceased to fight him with deadly weapons, and that deceased accepted the challenge, and that defendant killed deceased while he was getting ready to fight in pursuance of said challenge, or that he killed him before deceased could arm himself so as to be on equal terms with defendant, or that he killed deceased in a fight thus accepted, in either case it is murder, and they will find the defendant guilty accordingly.

5. Was a general charge respecting the reasonable doubt. If the jury have a reasonable doubt of the guilt of the prisoner, they will give him the benefit of that doubt, but such reasonable doubt must amount in the mind of the jury to something more than mere possibility or conjecture that the prisoner may be innocent of the charge, but a reasonable doubt of his guilt, arising out of the whole evidence in the case.

6. Was a charge respecting confessions. In confessions by a prisoner, all must be taken together, as well that which is in his favor, as that which is against him, but the jurors are the sole judges of the truth of confessions, and can receive a part and reject a part.

The prisoner asked the following charges, to-wit:

1. If the jury believe from the evidence, that the prisoner shot and killed Wright at a time when he had reasonable grounds to apprehend a design on the part of Wright to take his life or to do him some great personal injury, and that there was immediate danger of such design being accomplished, the homicide was justifiable, and they will so find.

2. Although the jury may believe the prisoner was mistaken in believing there was reasonable ground to apprehend a design on the part of the deceased to take his life or to do him some great personal injury, and that there was imminent danger of such design being accomplished; yet, if the jury are satisfied from the evidence that the prisoner believed himself to be in such danger at the time he shot and killed the deceased, the killing was justifiable, and they will so find.

3. The necessity to take life that will be justifiable need not be actual; it is sufficient if the circumstances surrounding the parties at the time be such as to impress the mind of the slayer with a reasonable belief that the necessity is impending. If, therefore, the jury believe from the evidence in this case, that the circumstances surrounding the prisoner at the time of the killing were such as to create a reasonable impression and belief on his mind that the deceased was about to take his life, or that he would, if let alone, immediately attempt to take his life, he was justifiable in shooting the deceased, and they will so find.

Which three instructions the Court refused to give, and in lieu thereof gave the following:

If the jury are satisfied from the whole evidence that the accused deliberately shot and killed the deceased, at a time when the accused was in no actual danger of great bodily harm, or of his life, then the accused is guilty of murder. But, if the jury are satisfied from the evidence, that the deceased intended to kill the accused, and that it was the purpose of the deceased to enter his house, arm himself with his gun, and return to the yard, and to make the attack upon the accused with the purpose aforesaid, then the accused might act in advance and make the attack upon the deceased. It devolves upon the accused, however, to show to the jury by clear and satisfactory proof, that there was an actual necessity for killing the deceased before he entered his house.

4. A party may anticipate the attack of his antagonist

and justifiably slay him, if under all the circumstances of the case, such course be necessary to protect himself; while it is necessary that this design should apparently be imminent, yet it is not essential that it should be immediate and impending at the very moment of the killing.

To which the Court added the following modification :

But where a party strikes where there is no impending danger, he is bound to show that the deceased intended, if let alone, to arm himself and make deadly assault upon him.

5. Unless the jury believe from the evidence that the prisoner killed Henry Wright from a premeditated design, formed beforehand, to effect his death, they cannot find him guilty of murder.

To which the Court added this modification :

But such deliberate design may be formed in a moment of time, and may be presumed from the weapon used, and the time at which it was used.

6. If the jury believe from the evidence that Evans killed Wright on sudden quarrel, without a premeditated and formed design so to do, they must not find him guilty of murder.

To which the Court added as a modification :

But such design may be formed in a short time, and if the killing was with a deadly weapon, it is evidence of a formed design.

To the action of the Court, in granting the instructions asked by the State, and refusing those of defendant, prisoner then and there excepted.

A motion was made for a new trial, on the ground that the verdict was contrary to the law and the evidence, which was overruled, and the prisoner excepted and sued out a writ of error to this Court, and assigns the following errors :

1. The Court below erred in excluding from the jury the testimony of the witness, P. Buck.

2. The Court erred in giving the instructions asked by the State.

3. The Court erred in refusing to give the first, second and third charges asked by the prisoner, and in giving the instructions framed by the Court as a substitute for them.

4. The Court erred in refusing to give the prisoner's fourth charge as asked by him, and in modifying the same.

5. The Court erred in refusing to give the prisoner's fifth and sixth charges, as asked by him, and in modifying the same.

6. The jury found contrary to the law and evidence.

J. L. Brown and *C. E. Hooker*, for the plaintiff in error;
J. S. Morris, Attorney-General, for the State.

SIMBALL, J., delivered the opinion of the Court:

1. Did the Court err in excluding from the jury the testimony of the witness, Buck, which was to the effect, that deceased came to his store some time before the killing, either drunk or much excited, and said he had had a difficulty with John Evans, the accused, and had run him off. Witness replied, John Evans is a dangerous negro to run against. Deceased said if John Evans fooled with him he would kill him, and applied to buy buckshot. From three to six weeks before the homicide, these threats were communicated to John. In the interview, Henry said the "fuss" had been made up. If this testimony could elucidate, or tend so to do, any point in the case pertinent to the issue, it ought not to have been excluded. Deceased did not declare a purpose to make so much as an assault upon the prisoner. "If John fooled with him he would kill him," putting the killing on the condition of the renewal or intimation of further trouble by John. But this may have been mere gasconade. Be that as it may, there is no principle of criminal law better settled—none more necessary to the peace of society and the safety of human life—than that threats,

however deliberately made, do not justify an assault and battery, much less the taking the life of the party making them. That is excused when done in the necessary defence of one's own life, or to escape great bodily harm.

To shoot down another on sight, and who, at the time, is making no hostile demonstration dangerous to life and limb, and especially, if not prepared and armed so to do, is, in law, murder. It is murder, because the law tolerates no justification, and accepts no excuse for the destruction of human life, on the plea of self-defence, except that the death of the adversary was necessary, or apparently so, to save his own life, or his person from great bodily injury, and there shall be imminent danger of such design being accomplished. The danger to life, or of great personal injury, must be imminent, present at the time of the killing, real or apparent, and so urgent that there is no reasonable mode of escape except to take life. When we use the term "apparent"—"apparent danger"—we mean such overt, actual demonstration, by conduct and acts, of a design to take life, or do some great personal injury, as would make the killing apparently necessary to self-preservation. As if A., who had threatened the life of B., presented at him a gun in a shooting posture, and within range, B. might well anticipate the fire, and if he should kill A., he would be justified, although it turned out afterwards that the gun was not loaded, and it was only intended to frighten him. Here was an act done, which was "apparently" dangerous to life, in execution of the threat. This serves to illustrate what is meant by "apparent" danger. The principle upon this subject, is carefully stated by the Chief Justice in *Wesley v. The State*,^b 37 Miss., 349. Now, if the excluded testimony had remained for the consideration of the jury, it would have had no influence on the verdict, unless there was testimony that the deceased, at the time of the killing, sought a deadly conflict with the accused, or was making some demonstra-

^b *Ante*, last case.

tion towards the accomplishment of his threat. There were, however, no developments made which would make this testimony pertinent, or entitled to a feather's weight. The evidence is conclusive, that the accused sent a message to the field for the deceased to come to the quarters, and when he got there he shot him down with his gun, when he was unarmed, without weapon in his hand or on his person, and when at the time there was no danger, real or apparent, to his life or person.

2. Was there error in the instruction granted on the prayer of the District-Attorney, and in the modifications of those requested by the accused. Whilst the facts belong to the jury, and it is their province to weigh the credibility and weight of testimony, and draw their own conclusions as to the truths established by it, the Court is esteemed to know the law, and it is the duty of the Court to inform the jury of the law of the cause, when invited to do so, by the parties, or either of them. Nor is the Judge confined to granting, or refusing instructions in the language in which they are propounded to him. Upon him rests the responsibility of a correct statement of the law. He should not permit the jury to be confounded, or confused by the language in which they are couched. But as presented to him by counsel, if they do not, on all the points embraced in them, fairly and concisely declare the law, he should so modify them as to communicate to the jury his conception of it; nor is he obliged by statute, to grant an instruction embracing a correct principle, if that principle can have no application to the facts in evidence.* *Boles v. State*; *Green v. State*, 28 Miss., 688. It has been several times declared from this Bench, that all the charges are to be construed together, as of *pari materia*; one as modifying another, so as to see whether as an entirety, they correctly lay down the law, and if so, although a single instruction may be too broad in its terms, a reversal ought not to take place. *Childers v. Ford*, 10 Smedes & Marsh., 25; *Mask v. State*, 36 Miss., 91.

* Acc. Shorter's case, *ante*, p. 256, and cases cited.

The rule is deduced by Wharton from American cases, "if the error be immaterial and irrelevant, and justice has been done, the Court will not set aside the verdict, nor enter into a discussion of the questions of law." Am. Cr. Law, §3080. It finds full support in the adjudications of this Court. *McLanahan v. Barrow*, 27 Miss., 664; *State v. Cotton*,^d 31 Miss., 504; *Wilkinson v. Griswold*, 12 Smedes & Marsh. 669; *Mask v. State*, *supra*.^e

The three first prayers asked by the accused, are directed to the question of homicide, in the presence of imminent danger to the life, or of great personal injury to the accused. The second of these refers to the urgency of the danger, to the judgment of the defendant; and altogether he may have been mistaken in his belief, yet, if he acted under such belief of danger, he was justifiable. The third asserts, that the necessity to take life, need not be actual, if the circumstances surrounding the parties, were such as to impress the mind with a reasonable belief that the necessity exists. The Circuit Judge, as we have said, may put the charges as prayed into such words, as in his opinion will more clearly and correctly inform the jury of the law arising on the evidence, although the instructions as asked, contain sound rules of law. The first of these instructions as written by counsel, presents the law of justifiable killing in the presence of danger to the life, or of great bodily injury.

The other two are susceptible of the interpretation, that the opinion or belief of the prisoner, as to the existence of the danger and its urgency, if fairly entertained, is a justification. The substitution made by the Court, whilst correctly stating the ingredients of murder, lays down the rule as to homicide in the emergency of danger to the life or person of the slayer in very favorable terms to the prisoner; more favorable, really, than the testimony or law would warrant. The testimony in one aspect of it, and as contemplated in this instruction,

^d *Ante*, p. 310. ^e And see *Wells' case*, *ante*, p. 151, note b.

tended to show that the deceased had accepted the invitation to the shooting match, and was probably going to his house to provide himself with a gun. If this were so, then the Court tells the jury that the prisoner may have killed the deceased, in anticipation of his return from the house with a gun. If there was a purpose in the accused to kill, and it was necessary to defeat that purpose by killing him before he entered his house, surely the prisoner could not complain of this charge, for it placed him on very broad grounds of self-defence. We do not think if one man invites another to mortal combat, that he who gives the invitation, being already armed, can justifiably shoot the other before he has armed himself, and whilst going to a place where his weapon may be, although the deceased had formed the purpose to use his weapon on his return. If that were so, it would only be necessary for one man to arm himself and advise his enemy to prepare to meet him, and then slay him whilst on his way to procure arms. His plea would be that the deceased had formed the design to kill, and was in the act of making preparation to put it into execution. The law gives countenance to no such idea. There is far less pretext for excuse or justification in such circumstances than when two, on mutual agreement, go out and fight with deadly weapons; in this case, it is murder if either slay the other, for the plain reason that there is a premeditated design in either to kill the other; *a fortiori*, would it be murder in him who sent the challenge, if he should, with a fire-arm, slay his adversary before the combat begun, and before deceased was armed to enter upon it. Doubtless the matter in the second and third prayers for instruction by the accused, which induced the Court to withhold them, was because it predicated in terms too positive and strong that the accused might act upon his own belief and opinion as to the emergency of impending danger. The law on this subject is stated with singular precision and felicity, in *Wesley v. The State*,¹ 37 Miss., 349, in these words:

¹ *Ante*, last case.

“A party may have a lively apprehension that his life is in danger, and believe that the ground of his apprehension is just and reasonable; but if he act upon them, and take the life of a human being, he does so at his peril. He is not the final judge, whatever his apprehension or belief may have been of the reasonableness of the grounds on which he acted.” In every case where the homicide is attempted to be justified on this ground, it must appear from the testimony in the cause, that the danger was urgent, present and imminent, and that no reasonable mode of warding it off or escaping from it existed, except to take life. The mere apprehension or belief that the deceased is about to arm himself, and return to enter into a combat, does not show a present and imminent danger. If he goes and arms himself to engage in a combat with deadly weapons, on an invitation accepted, or upon mutual agreement, and engages in it, it will be murder in him who provoked the fight, or in him who accepted, if either be slain. If individuals will conform to the law, and avail themselves of preventive justice in proper cases, as where an assault is threatened, or deadly menaces are uttered, claim the protection of the law, and put the wrong-doer under pledges and bonds to be of good behavior and keep the peace; or if the ministerial officers, charged especially with a preservation of order, as is their duty in all such cases, occurring within their view, take the offender before the proper functionary, that he may be put under legal constraint to deport himself peaceably, there would not be so many occasions of pressing on juries and courts this character of defence. Individuals are prompt enough to appeal to preventive justice to restrain threatened injuries to their property. The machinery of the law has made corresponding provisions to guard against menaced wrongs and injuries to the person. If, instead of resorting to these, persons against whom threats or menaces are made, take the life of their enemy on the apprehension that they may be executed, and when no effort to accomplish them is being made, they cannot be permitted to rely upon the appre-

hension of danger arising from the threats, as meeting the requirement of the statute, as laid down in one of the subdivisions of article 168, Code, p. 601. We are of the opinion, that taking all the instructions together, no error has been committed to the prejudice of the defendant; but, on the contrary, he had the benefit in the instruction substituted by the Court, of a broader exposition of self-defence in case of a homicide committed on the apprehension of a danger to his own life or person, than is warranted by the law. The true rule is correctly stated in the first and second charges given on behalf of the State.

Judgment affirmed.

HEAD v. THE STATE.

[44 Miss., 731.]

Supreme Court of Mississippi, October Term, 1870.

EPHRAIM G. PEYTON, *Chief Justice.*

HORATIO F. SIMRALL, } *Associate Justices.*
JONATHAN TARBELL, }

KILLING WITH DEADLY WRAPON—PRESUMPTION OF MALICE—BURDEN OF PROOF—CARRYING DEADLY WEAPONS—SELF-DEFENCE—THREATS.

1. Where death ensues from the use of a deadly weapon, the law presumes an intent to take life; and the use of such a weapon is *prima facie* evidence of malice.

2. This presumption of malice from the mode of killing obtains where no witnesses were present, and the circumstances attending the killing are unknown and unproved by the State.

3. If the act be traced to the deceased as the guilty agent, this presumption obtains until he overcome it by evidence showing excuse or justification.

4. But where the mode, manner and circumstances of the killing are in evidence, although it was done with a deadly weapon, then the character

of the act, whether criminal or not, and then its grade, whether murder or manslaughter, and whether excusable or not, is to be gathered from the entire body of the testimony. [Compare with Stokes' case, *post.*]

5. The law esteems the life and limb and bodily safety of every human being equal; therefore, every man may protect his life and limb at whatever hazard, but the danger must be present, immediate and imminent.

6. A fear or apprehension arising from previous threats, which have been communicated, afford no excuse, unless at the time of the killing an effort was being made to carry the threats into execution, and a necessity, apparent or real, existed at the time to slay, in order to prevent it. [Acc. Dyson's case, *ante*, and cases cited.]

7. The fact that the law allows a man to carry deadly weapons, does not diminish his responsibility in using them; and if a man accustomed to carry such a weapon kill another therewith, the presumption of malice arises, in like manner, and to the same extent, as though the weapon had been prepared for the occasion. [Compare with Cotton's case, *ante*, p. 310.]

In this case, the Court, among other things asked by defendant, refused to instruct the jury as follows:

3d. That by the laws of this State, each man has the right to bear arms about his person, and if Head had on his person a deadly weapon, but had not armed himself for the purpose of using the same against Doak or any other person, unless it became necessary in his self-defence, and being thus armed, he became involved in a difficulty with Doak, and took the life of Doak with such weapon; then malice cannot be inferred simply from the fact of his using such deadly weapon.

* * * * *

6th. That although the jury may be satisfied, from the evidence, that the prisoner killed the deceased, yet if the jury are satisfied, from the evidence, that the prisoner had reasonable grounds to apprehend a design on the part of the deceased to take the prisoner's life, or to do him some great bodily harm, or great personal injury, and that there was imminent danger of such design being accomplished, then they must find the prisoner not guilty.

* * * * *

Extract from the opinion of the Court, by SIMRALL, J.:

* * * * *

The use of a deadly weapon is *prima facie* evidence

of malice; because a man must be taken to intend the necessary and usual consequences of his act. To shoot or stab, or strike with a bludgeon, indicates a purpose to take life; but if the one or the other be employed to disable an adversary, in the very act of making a murderous and malicious assault, then the presumption is overcome. The proof of the use, in the case hypothesized, of the deadly weapon with attending circumstances, would show the excuse. Where the circumstances of the killing are known, and in evidence to the jury, the deductions and inferences should be made from all the facts. Where the death ensues from a shot-gun wound, or a stab, or other violent means, but no witnesses saw the act done, and the circumstances are unknown and unproved by the State, here the mode of killing raises a strong presumption of malice. If the act is traced to the accused as the guilty agent, that presumption continues until he overcomes it by evidence showing excuse or justification. If he offers no explanation of the killing; if he fails to show that it was an act of necessity, done *se defendendo*, the inference of malice, from the use of the deadly weapon, remains. What we mean to affirm is, that where the mode, manner and circumstances of the killing are in evidence to the jury, (although life was taken by a deadly weapon), the character of the act, whether criminal or not, and then its grade, whether murder or manslaughter, or whether excusable or not, is to be gathered from the entire body of the testimony. To use a deadly weapon justifies the inference, that the accused meant to kill, but whether he was excusable on the ground of *se defendendo*, depends on the facts and circumstances with which he was environed at the time. The law esteems the life and limb and bodily safety of every human being equal; therefore every man may protect his life and limb at whatever hazard, but the danger must be present, immediate and imminent. A fear or apprehension, arising from previous threats, which have been communicated, affords no excuse—none whatever—unless

at the time of the killing an effort was being made to carry the threat into execution, and a necessity, apparent or real, existed at the time to slay, in order to prevent it. We discover no other substantial objection to the other instructions granted for the State.

* * * * *

The third instruction was also properly refused. The fact that a man is permitted by law to carry arms, and the further fact that many persons do bear about on their persons, deadly weapons, do not, in the slightest degree, diminish their responsibility for the improper use of them.

We cannot, and do not sanction the proposition, that because the evil habit to some extent prevails of carrying deadly weapons, and the risk is thereby increased of an unlawful use of them, that, therefore, the law should look with more tenderness upon homicides committed by this class of persons. The excuse for the practice is that it is done for self-protection. If however, instead of this, they are used for offence, and upon persons unarmed, there is no reason, grounded either in correct sentiment, or in the principles of law, which would demand any relaxation or loosening of the criminal jurisprudence. It was always the doctrine of the law, that if a man arms himself for the fight, and draws his adversary on to the conflict, and slays him, it is murder. In what better light does he stand, who is habitually armed, and upon a sudden quarrel and fight with an unarmed adversary, slay him—that is, if he push the quarrel on and invite the blow.

A previous arming, as preparation for a rencounter, evinces deliberation, and is proof of express malice. But we repudiate with the Circuit Court, the idea contained in this instruction, “that if an armed person (not with reference to a controversy with the deceased) became involved in a difficulty with deceased, and took his life with such weapon, that malice cannot be inferred simply from the fact of the use of such weapon.” This would give very large immunity to those who

habitually go armed, and would apply a different measure of responsibility for the results and consequences of their difficulties, from those who go about unarmed. We have said that the law infers from the use of a deadly weapon, an intent to kill; and if the facts and circumstances do not show excuse and justification, it is criminal and malicious; if the weapon be drawn from its accustomed resting-place in the belt or pocket, it in no degree mitigates or relieves the act. The question still remains, Was the homicide necessary—was there excuse or justification?

* * * * *

The judgment was reversed on other grounds.

RIPPY v. THE STATE.

[2 HEAD, 217.]

Supreme Court of Tennessee, Nashville, December Term, 1858.

ROBERT J. MCKINNEY, }
 ROBERT L. CARUTHERS, } *Judges.*
 ARCHIBALD WRIGHT, }

EXCUSABLE HOMICIDE—THREATS—IMMINENCE OF THE DANGER—APPEARANCES—NECESSITY PRODUCED BY SLAYER—NON-FELONIOUS ATTACKS.

1. The fact that the deceased made violent threats against the life of the defendant long before, and up to a short period of the killing, and that these threats came to a knowledge of the defendant, will not justify the defendant in killing the deceased on sight. Such a proposition would be monstrous. [Acc. Evans' case, *ante*, p. 329; Lander's case, *post*; Johnson's case, *post*; and others.]

2. To excuse the defendant where previous threats have been made, he ought to be reasonably satisfied at the time of the killing that the deceased was doing some overt act, or making some demonstration showing a present intention of carrying such threats into execution. [Acc. Evans' case, *ante*, p. 329; Lander's case, *post*; 1 East, P. C., 272. And see note to Grainger's case, *ante*, pp. 242 *et seq.*]

3. To excuse a homicide, the danger of death or great bodily injury must either be real or honestly believed to be so at the time, and upon sufficient grounds. It must be *apparent* and *imminent*. To constitute the defence the belief or apprehension of danger must be founded on sufficient circumstances to authorize the opinion that the deadly purpose then exists, and the fear that it will *at that time* be executed. [Acc. Dyson's case, *ante*, p. 304; Wesley's case, *ante*, p. 319; note to Grainger's case, *ante*, p. 242; Williams' case, *post*. *Contra*, Philip's case, *post*; Carico's case, *post*; Bohannon's case, *post*.]

4. Even if sufficient cause to fear does exist, but the deed is not perpetrated under the apprehension it is calculated to inspire, or the fear is feigned or pretended, the defence will not be available.

5. So, a case must not only be made out to authorize the fear of death or great bodily harm, but such fear must be really entertained, and the act done under an honest and well-founded belief that it is absolutely necessary to kill at that moment, to save himself from a like injury.

6. Previous threats, or even acts of hostility, how violent soever, will not of themselves excuse the slayer, but there must be some words or overt acts at the time, clearly indicative of a *present* purpose to do the injury. Past threats and hostile actions or antecedent circumstances can only be looked to in connection with present demonstrations as grounds of apprehension. [Acc. Evans' case, *ante*, p. 329; Lander's case, *post*; Williams' case, *post*; Robert Jackson's case, *post*; and others.]

7. A real or apparent necessity brought about by the design, contrivance or fault of the defendant is no excuse. [Acc. Adams' case, *ante*, p. 208; note to Stoffer's case, *ante*, p. 220.]

8. If any less injury than death or great bodily harm is feared or indicated by the circumstances, the plea of self-defence will not be sustained, but the degree of crime may be reduced. [Acc. Thompson's case, *ante*, p. 92; John Kennedy's case, *ante*, p. 106; Benham's case, *ante*, p. 115; Wiltberger's case, *ante*, p. 34; Adams' case, *ante*, p. 208.]

9. Grainger's case, *ante*, p. 232, as modified by Copeland's case, *ante*, p. 41, declared to be the law.

Appeal by the defendant from a conviction of murder in the second degree.

W. H. Wisener, for the plaintiff in error; *John L. T. Sneed*, Attorney-General, for the State.

CARUTHERS, J., delivered the opinion of the Court:

James Rippy was indicted in the Circuit Court of Bedford County, for the murder of Houston Porter, and convicted of murder in the second degree, and sentenced to twenty-one years confinement in the penitentiary.

The verdict is well sustained by the testimony. The defence, it seems, was rested upon the existence or ap-

prehension of danger to himself at the time of the homicide. It is now insisted there is error in the charge on that doctrine. The objection is confined to this clause: "It is argued that the deceased made violent threats against the life of defendant long before, and up to a short period of the killing, and that these threats coming to a knowledge of defendant, he had a right to kill the deceased on sight. Such is not the opinion of the Court; but to excuse the defendant, and therefore acquit him, the evidence ought to be such as to have reasonably satisfied the defendant that the deceased, at the time of the killing, was doing some overt act, or making some demonstration, showing a present intention to carry such threats into execution; otherwise it would not excuse him."

The law as thus laid down by the Court is substantially correct. The doctrine of the Grainger case, as explained by that of Copeland, is undoubtedly the law. Yet no case has been more perverted and misapplied by advocates and juries. We have had one case before us in the last few years, in which the broad proposition stated in the first of the above extract, was charged as the law. But for this, and the indication that it has obtained to some limited extent in the legal profession, it would scarcely be deemed necessary to notice it. There is no authority for such a position. It would be monstrous. No Court should for a moment entertain or countenance it. The criminal code of no country ever has, nor, as we presume, ever will, give place to so bloody a principle.

The law on this subject is, that to excuse a homicide, the danger of life or great bodily injury, must either be real, or honestly believed to be so at the time, and upon sufficient grounds. It must be *apparent* and *imminent*. Previous threats, or even acts of hostility, how violent soever, will not, of themselves excuse the slayer, but there must be some words or overt acts at the time, clearly indicative of a *present* purpose to do the injury. Past threats and hostile actions, or antecedent

circumstances, can only be looked to in connection with present demonstrations as grounds of apprehension. To constitute the defence, the *belief* or apprehension of danger must be founded on sufficient circumstances to authorize the opinion that the deadly purpose then exists, and the *fear* that it will *at that time* be executed. The character of the deceased for violence, as well as his animosity to the defendant, as indicated by words and actions then and before, are proper matters for the consideration of the jury on the question of reasonable apprehension. Even if sufficient cause to fear does exist, but the deed is not perpetrated under the apprehension it is calculated to inspire, or the fear is feigned or pretended, the defence will not be available. So a case must not only be made out to authorize the fear of death or great harm, but such fear must be really entertained, and the act done under an honest and well founded belief, that it is absolutely necessary to kill at that moment, to save himself from a like injury. It is scarcely necessary to remark that a real or apparent necessity brought about by the design, contrivance or fault of defendant is no excuse. If any less injury than death or great bodily harm is feared or indicated by the circumstances, the plea of self-defence will not be sustained, but the degree of the crime may be reduced.

According to these principles, the guilt of the deceased is clearly made out; there was no error in the charge, and the judgment will be affirmed.

Judgment affirmed.

WILLIAMS v. THE STATE.

[3 HEISKELL, 376.]

*Supreme Court of Tennessee, Nashville, December Term, 1871.*A. O. P. NICHOLSON, *Chief Justice.*

P. TURNEY,

ROBERT MCFARLAND,

JAS. W. DEADERICK,

THOS. J. FREEMAN,

JOHN L. T. SNEED,

} *Judges.*

OLD GRUDGE—KILLING IN SELF-DEFENCE—IMMINENCE OF THE DANGER—
OVERT ACT—THREATS—APPREHENSIONS OF DANGER.

1. Where an old grudge is clearly proven, the law presumes that the killing occurred on this old grudge, unless the proof shows a new and sufficient provocation, and then the law would presume that the killing was on the new provocation; and if that provocation was sufficient in law to rebut the presumption of malice, the offence would be voluntary manslaughter, or in self-defence, dependent on the proof. [Acc. Hill's case, *ante*, p. 199; Copeland's case, *ante*, p. 41.]

2. Where self-defence is urged as an excuse for homicide, the important questions are: Did the accused really entertain the fear of death or great bodily harm at the time he did the killing? and did he kill under an honest and well founded belief that it was absolutely necessary for him to kill the deceased *at that moment*, to save himself from a like injury? [Acc. Lander's case, *post*; Rippy's case, *ante*, last case; Dyson's case, *ante*, p. 304; Wesley's case, *ante*, p. 319. Contra, Philip's case, *post*; Carico's case, *post*; Bohannon's case, *post*.]

3. Where the proof showed that the defendant was, when drunk, a blood-thirsty and reckless bully; that he entertained a deadly spirit of revenge against the defendant; that he had made frequent and violent threats against the defendant, which threats continued down to the time of the killing; that he had, on one occasion, assailed the defendant with a deadly weapon, and driven him out of his house; that on the day of the killing he had endeavored in various ways to provoke a difficulty with the defendant; that on the day and at the time of the killing, he was drunk, and armed with a six-shooter; that the defendant knew of his violent animosity towards him, and the grounds on which it was entertained, and his desperate character when drunk; yet, as the proof did not show that the defendant had a reasonable ground for believing that his life was in danger *at the*

moment of the killing, a verdict of murder in the second degree was sustained, although the proof fully showed that the defendant did the killing under an honest apprehension, that the deceased would kill him in some of his drunken moments.

4. It is not enough that the defendant honestly believed that his own life was in danger, or that he was in danger of great bodily harm from the deceased, *at some future time*; but he must have believed that the danger was real *at the time*; that it was *apparent* and *imminent*. There must have been words or overt acts at the time of the killing clearly indicative of a *present purpose* on the part of the deceased to take his life or do him some great bodily harm. [Acc. Lander's case, *post*; Evans' case, *ante*, p. 329; Rippy's case, *ante*, last case; Robert Jackson's case, *post*. Contra, Philip's case, *post*; Carico's case, *post*; Young's case, *post*; Bohannon's case, *post*.]

5. The law as laid down in Grainger's case, *ante*, p. 238, and explained, analyzed and defined in Rippy's case, *ante*, last case, is stated at length, and held to be the governing law of this case.

NICHOLSON, Ch. J., delivered the opinion of the Court:

At the November Term, 1871, of the Lincoln County Circuit Court, John C. Williams was tried for the murder of Toliver R. Garret, and convicted of murder in the second degree, and sentenced to the penitentiary for twenty years. His motions for a new trial and in arrest of judgment having been overruled, he has appealed to this Court.

* * * * *

The last and most important question raised, is, as to the sufficiency of the evidence to support the verdict. The settlement of this question makes it necessary to examine with care the evidence in the case.

The first witness for the State was William Edwards. He proves that Garret was killed about the 1st of September, 1870, at witness' house. He was shot by defendant with a shot-gun, and did not live a minute. Garret was employed by witness to build a stable, but he was not at work that day. He was at the witness' house early in the morning, and afterwards was at witness' and defendant's still-house, and was drinking, but remained but a short time, and made no enquiries for, or said anything about defendant. Garret returned again to the still-house in the evening. Witness and defend-

ant were gearing up the team to haul some brandy to witness' house, which was about a quarter of a mile distant. Defendant's house was about a mile distant. When Garret returned to the still-house in the evening, he "came cursing, ripping and swearing." He got off his horse, took the proof vial, sunk it into a barrel of brandy, came to where defendant and witness were, put his thumb upon the mouth of the vial, as if he was going to try the bead, struck the vial in his hand, and looking at defendant, drank a toast, which was a vulgar toast. It was not a toast of friendship or health, but was a vulgar toast. Defendant said to witness, "I must leave here, or I will have a difficulty with Garret." Witness advised him to go, to avoid a difficulty with Garret. Defendant then left, and went to witness' house. Garret was at the still-house about half an hour. Witness left the still-house a short time before Garret, leaving at the still-house, Garret, McIntosh and Stroud. Defendant had left the still-house some time before witness did. Garret overtook witness and Tillery, and the three went together to witness' house; witness walking, Tillery driving the wagon, and Garret riding horseback. On the way Garret pulled out his pistol and waved it. This was about three hundred yards from witness' house. The pistol was then put up. They approached the house on the east side. Witness pulled down the fence to let in the wagon, but Garret leaped the fence with his horse before it was pulled down. When the three got in sight of witness' house, they came to the road leading to Garret's house, which passed about forty yards from witness' house. Witness tried to get Garret to go on his road home, saying to him, "yonder is Williams' horse." Garret said, "I have got to have another dram." After they got into the house, witness said to Garret, "if I give you another dram, will you go off?" and he said he would. But before this, Garret had helped witness, defendant and Tillery, to unload the wagon. After witness gave Garret the dram, he got on his horse and started off. He afterwards came back, and called witness

out, and the two were talking about exchanging some brandy for bacon. Garret said, "there is one fellow in the house that he would go that far in hell for," (measuring about twelve inches on his arm.) Tillery and defendant were in the house at the time. Garret and Tillery were unfriendly at the time, but they spoke to each other. Witness says, that when Garret went into the house when they arrived with the brandy, there were only two or three words passed between him and defendant. While witness and Garret were talking about the exchange of brandy for bacon, defendant stepped to the door, and said, "Garret, you have come for a fuss, and by God, if you don't mind you will get it." Garret replied, "just walk out, and you can have it. I will give more than you can take, or can carry off from here." When Garret said that, defendant stepped back and got his gun, and then stepped out on the puncheon between the houses, and said, "are you in the same notion still?" and defendant shot him. When Garret saw defendant with the gun, he said, "by God, let it come." He was at the time, sitting on his horse, about eight steps from the house. His pistol, a five or six shooter, was in his left pants' pocket. He was a left-handed man. Garret had been living in the neighborhood about two years. When sober he was a peaceable man, but when drunk he was a dangerous one. He was drunk that day. He was a small man, tolerably stout, and a little larger than defendant. While unloading the brandy, Garret and defendant did not speak. One had one end of the barrel, and the others the other end. Garret did not draw, or attempt to draw any weapons, after he came to the house. At the time defendant said to Garret, "You have come for a fuss, and by God, if you don't mind you can get it," Garret had not said anything to defendant, or about defendant; that is, did not mention defendant's name. It was about eight steps from the house when Garret said, "He would go twelve inches in hell for a fellow in the house."

Milly Edwards, for the State, proved that defendant

was at her house the day Garret was killed. Defendant came first. After he got there, he said, "he had seen Garret at the still-house, and Garret was cutting up down there; that Garret had said nothing to him, but he knew Garret was pitching it all at him." Defendant got his gun and called for powder. He sat down and laid the gun across his lap. This was before Garret got in sight. Witness saw Garret coming and told defendant to go and hide from him. He said, "he had been running long enough, and did not intend to run any further." He then told me and Mrs. Fowler to go into the other room. He then saw Garret coming, and got up and set the gun behind the door. Witness told defendant to run. He said, "he had given up his house once to Garret at the Plains, and he was not going to run any more." Witness saw Garret when he came up. He was not doing anything. He came up behind the house, after he started off, and talked with Edwards. The gun belonged to Williams; he left it at Edwards' some time, in passing two or three weeks before. He took the gun off with him. She did not see the shooting. Garret rode close up to the house when he came back. Defendant was sitting down. Witness was standing up.

Mrs. Fowler, for the State, proved that she was at Edwards' the day Garret was killed. Defendant said, "if Garret comes up, he intended to kill him, he had run long enough." He had the gun across his lap scraping it; said to me to go into the other house. Garret came up and said "howdy" to me, and nodded his head to defendant; but defendant did not speak. Garret came up horseback; was off his horse when he spoke. Before Garret came, defendant said he had run his last time. Witness left before the killing.

On cross-examination, witness said, the first she saw of defendant, he was sitting in the door, with the gun in his hand. Garret walked up to the house and nodded. She don't know whether he spoke to witness or defendant.

This was all the testimony of the State, as to what occurred at the house at the time of the killing.

Byers, for the State, proved that, on the day of the difficulty at Pleasant Plains, about six months before the killing, defendant came to him for a gun. He did not get it. Defendant made no threat against Garret. Garret wanted witness to get half a pint of whiskey from defendant's grocery, saying that he did not want to go there; that he did not want to meet defendant. Garret had a shot-gun and pistol. He was very drunk that day; heard him make no threats against defendant; he was inclined to be boisterous when drunk.

John J. Rauls, for the State, proved that he was at the Plains the day of the difficulty; saw some demonstrations between defendant and Garret that day; heard no threats by defendant; saw Garret knocking around on the streets with a gun; at the same time defendant came into witness' store, and got a shot-gun and loaded it. He next saw defendant when Garret was down on the ground or platform; defendant had a gun, and said, "shoot him" or "kill him"; this was soon after defendant got the gun. Heard Garret say nothing at the time; was very drunk, and down on the ground. Defendant did not try to shoot Garret.

M. D. Hutchinson, for the State, proved that, the evening after the difficulty, he was with defendant; he said Garret said to him, that he, Garret, was one of the boys that feared no noise; and defendant said that was the first time he knew that Garret had anything against him.

J. M. Davis, for the State, proved that he went after defendant after Garret was killed; did not find him at home. Afterwards, went to Limestone County, Ala., and arrested him.

Buck Roper, for defendant, proved, that about a year before the killing, he rode out from Pleasant Plains in company with Garret and defendant. Witness rode between them. Garret told defendant "not to laugh at his stirrup leather, if it was a rope." Defendant said he had not laughed at his rope stirrups. Garret said he was one of the boys that feared no noise, although one hun-

dred and twenty miles from home. He repeated this expression ten or fifteen times. When he used it first he drew a pistol. Defendant asked him if he wanted a fuss; he said he did. Defendant told him to put up the pistol, he had nothing against him, and he put it up. Garret drew the pistol three or four times. Garret told witness to ride on, that he might settle it with defendant. Witness told him "he would not do so; that he did not want him to kill defendant." This was about a mile from the Plains. When they got to the forks of the road, defendant and witness turned off to go home. Garret got down and hitched his horse to a bush, and pulled out his pistol and wanted defendant to fight him; defendant rode on, and Garret followed him about one hundred yards. Defendant told him to put up his pistol; was all he said, and Garret put it up. Witness is the nephew of defendant. Garret was about half drunk; he did not present his pistol at defendant.

Dick Burnett, for defendant, proved that on the evening of the difficulty detailed by the last witness, Garret came by his house; said he had a fuss with defendant; wanted him to fight it out fair; that defendant ran off. Witness told this to defendant four or five months before the killing.

R. M. Dunlap, for defendant, proved that he witnessed the difficulty at Pleasant Plains. He was in the front room of defendant's grocery, with defendant, Tillery and others; saw Garret coming across the street with his gun. Defendant and Tillery both remarked, "Yonder comes Garret for a fuss." All went into the back room, except the defendant, and commenced playing cards for fun. Heard Garret come into the front room, and stop in there for a time, and heard a rattling of glasses. Garret came into the back room and commenced cursing, and said he could beat a certain man at his own game. Tillery soon got up and started out. Garret jumped up, grabbed his gun, and said he would kill them. Defendant jumped over the counter, and went out the front door with Tillery, Witness seized the gun and took the

caps off, and gave it back to Garret. Garret went hurriedly to the front door, and asked "which way have they gone?" Witness told him a contrary direction from that they had gone. Never heard Garret make any threats. About ten minutes afterwards, saw Garret with a pistol belted round him. Garret was drunk. Saw him lying on the ground. Witness knocked him down for striking him. Defendant came up with a gun and said, "kill him." Garret went to Hodges' store, and asked if they had gone in there. Hodges met him at the door, and told him "No, not to come in there; there were some ladies in there." He said he would go in, and presented his gun at Hodges, and snapped it. Hodges was in the act of throwing a weight at him, when witness "hollered" not to throw; there were no caps on the gun. Hodges knocked him down. Defendant put up his gun after the difficulty.

Gillespy Riley, for defendant, proved that, in 1869, Garret told him he and defendant had had a fuss that day, and that "if defendant would not shoot it out, or fight it out, it would have to stop right there; but if he ever came to his house to abuse him, as he had done once, he would hurt him." On cross-examination, he said, in the same conversation, that defendant, Tillery, Daniel Hardin and Jim Vickers had come to his house in disguise, and abused him, and if they ever came again he would hurt them.

Irwin Baker for defendant, proved that, last spring was a year, saw Garret with a shot-gun in his wagon. Asked him what he was going to do with it. Said there was a good many squirrels, and he would shoot them if they came in his way. Said that he had been run over and imposed upon by men on his own premises, and if it happened again he was going to defend himself, and his wife and children. He did not say it was defendant. Witness told defendant of this. On cross-examination, he said two of the parties in disguise were Daniel Hardin and Jim Vickers. At the time witness told defendant what Garret said, witness says, "he approached me

in a rough manner, cursed me, said God damn you, hold on there; God damn you, don't speak to me again. Said God damn you; I was frightened." Witness then told him what Garret said.

Thomas Allison, for defendant, proved that he was at the still-house on the day of the killing; late that evening heard Garret swear he would kill defendant before sunset, or defendant would kill him. Said it twice. He did not tell defendant of it. Garret had a pistol—six-shooter—in his right pants' pocket. His conversation with Garret was in the still-house; no one present. It was an hour and a half after defendant left before Garret left. Defendant came back afterwards, and told witness Garret was killed up there, and to go and take care of him. Garret left half an hour after he made the threat. Witness says he did not say to A. D. Anderson, in Fayetteville, on Tuesday last, that Garret said, if defendant ever interrupted him, he would kill him.

A. D. Anderson, for State, proved that, on last Tuesday, in Fayetteville, Thomas Allison told him that Garret said, if defendant ever fooled with him any more, he would kill him.

The question to be determined upon this evidence is, whether the verdict of murder in the second degree is sustained thereby. As the jury have found that defendant was not guilty of murder in the first degree, it is unnecessary for us to enquire whether the killing was attended with that deliberation and premeditation requisite to constitute murder in the first degree.

The proof as to the killing by the defendant, with a deadly weapon, is clear and uncontradicted. The presumption, therefore, is, that it was done with malice. This presumption stands until it is rebutted by evidence showing, either that the killing resulted from passion produced by sufficient provocation, or by evidence that the killing took place under circumstances which excused the defendant for taking the life of the deceased, either to save his own life, or to prevent great bodily harm.

WILLIAMS v. THE STATE.

[3 HEISKELL, 376.]

*Supreme Court of Tennessee, Nashville, December Term, 1871.*A. O. P. NICHOLSON, *Chief Justice.*

P. TURNEY,	} <i>Judges.</i>
ROBERT MCFARLAND,	
JAS. W. DEADERICK,	
THOS. J. FREEMAN,	
JOHN L. T. SNEED,	

**OLD GRUDGE—KILLING IN SELF-DEFENCE—IMMINENCE OF THE DANGER—
OVERT ACT—THREATS—APPREHENSIONS OF DANGER.**

1. Where an old grudge is clearly proven, the law presumes that the killing occurred on this old grudge, unless the proof shows a new and sufficient provocation, and then the law would presume that the killing was on the new provocation; and if that provocation was sufficient in law to rebut the presumption of malice, the offence would be voluntary manslaughter, or in self-defence, dependent on the proof. [Acc. Hill's case, *ante*, p. 199; Copeland's case, *ante*, p. 41.]

2. Where self-defence is urged as an excuse for homicide, the important questions are: Did the accused really entertain the fear of death or great bodily harm at the time he did the killing? and did he kill under an honest and well founded belief that it was absolutely necessary for him to kill the deceased *at that moment*, to save himself from a like injury? [Acc. Lander's case, *post*; Rippy's case, *ante*, last case; Dyson's case, *ante*, p. 304; Wealey's case, *ante*, p. 319. Contra, Phillip's case, *post*; Carico's case, *post*; Bohannon's case, *post*.]

3. Where the proof showed that the defendant was, when drunk, a blood-thirsty and reckless bully; that he entertained a deadly spirit of revenge against the defendant; that he had made frequent and violent threats against the defendant, which threats continued down to the time of the killing; that he had, on one occasion, assailed the defendant with a deadly weapon, and driven him out of his house; that on the day of the killing he had endeavored in various ways to provoke a difficulty with the defendant; that on the day and at the time of the killing, he was drunk, and armed with a six-shooter; that the defendant knew of his violent animosity towards him, and the grounds on which it was entertained, and his desperate character when drunk; yet, as the proof did not show that the defendant had a reasonable ground for believing that his life was in danger at the

It is abundantly shown by the evidence, that there was an old grudge between the defendant and deceased. On the part of the deceased, it is shown that he believed the defendant, together with others, had visited his house in disguise, and had abused him; in what way the evidence does not show, but it was shown that the abuse was such that the deceased brooded over it, and cherished the purpose of having revenge.

This feeling of revenge is shown to have been cherished by the deceased down to the very moment when he was killed. Almost the last words he uttered, were, that he would go twelve inches into hell to have revenge.

On the part of the defendant, it is shown that his hostility to the deceased grew out of the difficulty on the road—when the deceased endeavored to provoke him into a difficulty—and out of the conduct of deceased in Pleasant Plains, when he was driven out of the house and forced to seek safety in flight. His hostility to the deceased on that occasion was manifested by his approaching him when he was lying on the ground, knocked down, calling for him to be shot or killed. It was distinctly manifest, only a few minutes before the killing, in his declarations to the two female witnesses, that he had been driven from his home by the deceased, and that he had run from him for the last time, and that if deceased came there he would kill him.

An old grudge is, therefore, clearly proven, and the law presumes that the killing occurred on this old grudge, unless the proof shows a new and sufficient provocation—and then the law would presume that the killing was on the new provocation—and if that provocation was sufficient, in law, to rebut the presumption of malice, the offence would be voluntary manslaughter or in self-defence, dependent upon all the proof. Was there sufficient provocation for the killing to rebut the presumption of malice? It is not shown that the defendant was informed of the threat made at the still-house, as proved by Allison—if it be conceded that any such threat was made there—and if it was made, and had been com-

municated to defendant, it would not be such provocation; because no words are regarded as sufficient provocation in law. Defendant admitted to the female witnesses that the deceased had said nothing to him at the still-house, but his conduct there had impressed him with the belief that deceased was seeking to bring on a difficulty. This was not such provocation as excited his passions, and impelled him at once to resent the insult, but it only produced the conviction in his mind that it would be prudent for him to leave, in order to avoid the difficulty which he apprehended.

After the deceased came to the house he spoke only two or three words to defendant, according to the testimony of Edwards, and what these were we are not informed. According to the female witnesses, deceased, when he came up, nodded and said "howdy." It is not certain, by the evidence, to whom he nodded, or to whom he said "howdy;" nor is it shown that there is anything peculiar or significant in the "nod." Defendant took no exception to deceased's conduct on that occasion; they went out together and helped unload the wagon. Up to this point of time there was no provocation. But the deceased got on his horse and started off, and very soon returned and called for Edwards. While conversing with Edwards about exchanging brandy for bacon, he made the remark that "there was a fellow in the house he would go twelve inches in hell for." The only proof that defendant heard this remark, is, that it was made within eight steps from the house in which defendant was sitting, and as the distance was such that the remark might be heard, it is inferred that he did hear it. If this be true, as significant as the language was of the malice of the deceased towards either the defendant or Tillery—for both were in the house, and he had the same cause for hostility to both—yet, the law regards no language, however violent or offensive, as sufficient provocation for taking life. But if defendant heard the offensive remark, the proof shows that it did not excite his passions and impel him to do the killing under the influence

of passion; but he rose from his seat and, without getting his gun, stepped to the door and said to the deceased: "You have come for a fuss, and by God, if you don't mind, you can get it." At that time deceased was sitting on his horse, he made no demonstration by drawing his pistol; it does not appear from the proof that he knew defendant had a gun behind the door in the house. He replied: "Just walk out and you can have it. I will give you more than you can take or carry off from here." Without saying more, defendant retired from the door, got his gun, and returned; but even then he did not instantly fire, but said, "are you in the same notion still?" When the deceased saw defendant return with his gun, his only words were, "by God, let it come," and thereupon defendant fired and killed him.

There was no manifestation of passion on the part of defendant, and there is nothing shown on the part of deceased which the law regards as a sufficient provocation. We are, therefore, of opinion that the killing was with malice, unless the proof shows that the defendant was in such imminent danger of his life, or of great bodily harm, as will make the killing justifiable in self-defence.

It is insisted for defendant, that the facts in proof bring this case within the principle of *Grainger v. State*,* 5 Yerg., 459. Judge CATRON stated the facts upon which his opinion rested, as follows. "Grainger used all the means in his power to escape from an overbearing bully. He was shuddering with fear, and his last hope of protection was defeated when Rainey's door continued closed against him. He shot only to protect his person from threatened violence, and that great. It was certain. Henson sat quietly on the fence; the woman and Rainey did not open the door; they, no doubt, were afraid of Broach, who displayed the traits of a reckless bully, and would have attacked Grainger the moment he reached him, as well in the house as out of it. From Henson no assistance could be hoped for." Upon these facts Judge

**Ante*, p. 238.

CATRON said: "Was there malice prepense, in this case of homicide, so as to exclude the benefit of clergy within the 23 Henry 8, c. 1? Did Grainger display a cold, deliberate and wicked conduct? a heart lost to all social order, and fatally bent on mischief? It cannot be believed. He behaved like a timid, cowardly man; was much alarmed; in imminent danger of a violent and instant assault and battery, and was cut off from the chances of probable assistance." In the case of *Rippy v. The State*,^b 2 Head, 218, Judge CARUTHERS, after recognizing the doctrine of *Grainger v. The State*, as explained by that of *Copeland v. The State*,^c 7 Humph., 479, because of the perversions and misapplications of that case by advocates and juries, proceeds to lay down the law as follows: "The law on the subject is, that, to excuse a homicide, the danger of life or great bodily injury must either be real or honestly believed to be so at the time, and upon sufficient grounds. It must be *apparent* and *imminent*. Previous threats, or even acts of hostility, how violent soever, will not of themselves, excuse the slayer, but there must be some words or overt acts at the time, clearly indicative of a *present* purpose to do the injury. Past threats and hostile actions, or antecedent circumstances, can only be looked to in connection with present demonstrations as grounds of apprehension. To constitute the defence, the belief or apprehension of danger must be founded on sufficient circumstances to authorize the opinion that the deadly purpose then exists, and the *fear* that it will *at that time* be executed. The character of the deceased for violence, as well as his animosity to the defendant, as indicated by words and actions, then and before, are proper matters for the consideration of the jury on the question of reasonable apprehension. Even if sufficient cause to fear does exist, but the deed is not perpetrated under the apprehension it is calculated to inspire, or the fear is feigned or pretended, the defence will not be available. So a case must not only be made out to authorize the fear of death or

^b *Ante*, p. 345. ^c *Ante*, p. 41.

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evidence showing whether defendant was guilty of the outrage complained of by the deceased or not; nor is there anything, showing that defendant ever sought to explain the matter, or to relieve the deceased of his suspicions. But it is in proof, that he knew of the deceased's hostility, and its alleged cause, and also, that the deceased was a dangerous man in liquor. He was so well apprised of these things, that when the deceased approached him at the still-house, and gave him the look described by the witness, drank the vulgar toast, and struck the proof-vial in his hand, defendant at once understood these things as being "pitched" at him. To avoid a difficulty, he went to Edwards' house, where he had previously left his gun.

That one inducement with him to go to Edwards' house was, that his gun was there, we think may be fairly inferred, from the fact, that so soon as he reached there, he got his gun, called for powder, and sat down to put it in order; and from the fact, also, that he informed the women at the house of the difficulty he apprehended, and his purpose to kill the deceased if he came there. He evidently apprehended that the deceased would come, and he determined to be prepared.

In view of the known violence of deceased's character, when drunk, and of deceased's known anxiety to get defendant into a difficulty, we see nothing which was either imprudent or wrong in the fact that the defendant left the still-house, went to Edwards' house, and put his gun in order. Whilst we discover nothing indicating cowardice, on the part of the defendant, in leaving his house at Pleasant Plains, or the still-house, to avoid the drunken violence of the deceased, we can well understand that even a brave man would have fears from such an enemy as deceased is shown to have been.

That defendant had fears of the deceased, and had good reason to have fears, we think the proof fully establishes. But the important question now presents itself, did he really entertain the fear of death or great bodily harm at the time he fired the gun and did the

deceased sitting on his horse, with no pistol drawn, and no indication of an intended attack, with Edwards standing by him, he could not have believed that he was in imminent danger. But he probably did suppose, that the deceased had returned for a difficulty, for he said to the deceased: "You have come for a fuss, and by God, if you don't mind, you can have it." This remark, as far as we can see, was provoked by no word or action of the deceased. Edwards proves, that at the time defendant made the remark, "You have come for a fuss, and by God, if you don't mind, you can get it," the deceased "had not said anything to defendant or about defendant; that is, did not mention defendant's name." But defendant assumed that deceased had returned for a fuss, and being well prepared, he determined to bring the matter to an issue at once, by telling deceased "if he did not mind, he could have it." The response of the deceased was, "just walk out and you can have it; I will give you more than you can take, or carry off from here." The question here arises, was defendant then in such imminent danger, that, for the preservation of his own life, it was absolutely necessary that he should return into the house and get his gun from behind the door and step out and shoot deceased? When the deceased responded to him and invited him out, he seemed to understand defendant's remark as a banter or challenge; he said, "just walk out and you shall have it;" but he remained on his horse and made no demonstration of getting ready, by drawing his pistol, or otherwise.

The defendant was in no danger, when he was standing in the door, talking to deceased. It was only on condition that he would walk out, that deceased proposed to let him have a fuss. He had no weapon drawn, and made no attempt to draw one. Much less was defendant in danger, after he returned into the house. The deceased could not then hurt him; if he had dismounted and attempted to enter the house, with his drawn weapons, the danger might then have been real, apparent and imminent. But no such thing occurred. He remained on his

tols tied to his saddle ; ” and the defence thereupon proposed to prove by the witness that the accused “ uttered no hostile expressions about the deceased, and spoke of no difficulty with any one,” it was held that the offer was properly rejected.

2. The declaration of an intent to kill a person on sight, hunting such person for that purpose, and being armed for that purpose with deadly weapons ; and although the parties, owing to their places of residence, cannot reasonably fail soon to encounter each other ; and although the jury believe from the evidence that the threats would have been executed at the first opportunity, will not justify or excuse the party threatened in lying in wait and killing the party making the threats, nor, it seems, in commencing the attack, without lying in wait, where the encounter could have reasonably been avoided ; nor will such a state of circumstances reduce a killing by lying in wait, from murder in the first, to murder in the second degree. [Acc. Scott’s case, *ante*, p. 163 ; Evans’ case, *ante*, p. 329 ; Rippy’s case, *ante*, p. 345 ; Williams’ case, *ante*, last case. Contra, Phillip’s case, *post* ; Carico’s case, *post* ; Young’s case, *post* ; Bohannon’s case, *post*.]

3. Mere naked threats, unconnected with acts, can never afford a justification or excuse for the commission of unlawful acts, or justify an attack, or even an assault ; much less a killing by lying in wait with a deadly weapon. [Acc. Evans’ case *ante*, p. 329 ; Rippy’s case, *ante*, p. 345 ; and others.]

4. The right of self-defence discussed at length, and many authorities cited to the general effect that this right is founded in *necessity*, exists in a state of nature, and in every possible condition of society ; that it cannot be taken away, nor is it restrained, but its exercise regulated, by the municipal law, so as to prevent its abuse ; that this right does not extend to the right to kill in order to ward off a *threatened* or *contingent* danger, or a danger which exists in *machination* only ; but that in order to justify such killing, the danger must have been *present* and *imminent*, and no other means must have existed of escaping it ; or from the nature of the attack, the slayer must have had *reasonable grounds to believe* that such was the case. [Acc. McLeod’s case, *post*, and other cases.]

5. In a trial for murder, where an attempt is made to prove that the homicide was committed in self-defence, the questions are, was the prisoner in present danger of great bodily harm at the time of the killing ? and was the homicide committed in a *bona fide* effort to preserve himself from the impending danger ? [Acc. Williams’ case, *ante*, p. 349.]

6. Every intentional killing is not necessarily murder. For, it may be from a principle of inevitable necessity, and then it will be self-defence ; it may be done in the transport of passion and heat of blood, upon a sudden and sufficient legal provocation, and then it will be manslaughter only ; or it may be done by the command or permission of the law, and then it will be justifiable or excusable homicide. But if it be unattended by any of these circumstances of alleviation, excuse or justification, which will relieve the party killing from the guilt of murder ; if it be murder within the proper legal meaning of that term, and be proved to be a “ premeditated and deliberate killing,” within the meaning of those terms, as employed in the statute, it will necessarily be murder in the first degree.

Alfred R. Lander was put upon his trial for the murder of Eli Ussery. It appeared in evidence, that there had been ill-feeling and threats of long standing between the prisoner and the deceased. They lived in the same neighborhood, a few miles from the town of Jefferson, and in going and returning, travelled the same road two or three miles. They went to town on the morning of the killing, both armed,—the prisoner with holster pistols, and the deceased with a double-barreled shot-gun. Same day the deceased was heard to make violent threats against the life of the prisoner, declaring he would kill him on sight; and had his gun in his hand all the time, and said he was hunting the prisoner; his manner of looking about attracting the attention of several of the witnesses. The prisoner was advised of these threats, and was cautioned to be on his guard, as the deceased might attempt to carry them into execution. He thereupon went some distance into the country, to the residence of one Jackson, where he procured a double-barreled shot-gun, and returned to town in company with Jackson. He remained in town for some time, observing the movements of the deceased, but avoided being seen by him, until in the evening, when the deceased was seen to go to the Post-office and get the mail bags, preparatory to leaving town. The prisoner thereupon proceeded by a back way or alley, to a place where he could intercept the deceased as he should go out of town by the usually travelled road. The deceased had a son, a lad, with him; and after starting, delayed, to change the mail bags from the horse on which he rode to that on which his son was riding. In the meantime, the prisoner had taken his position in advance, by the wayside, concealed from the view of the deceased by an unoccupied blacksmith's shop, and there awaited his approach. The son was in advance of the father, and as the latter was passing, the prisoner hailed him, calling his name, which arrested his attention, and caused him to bring his horse to a halt, and turn towards the prisoner, who immediately discharged at him one

barrel of his gun. The deceased did not fall upon the first fire, but seemed in the act of dismounting, when the prisoner fired a second time, upon which the deceased fell mortally wounded, and immediately expired. Under the charge of the Court, the jury found the prisoner guilty of murder in the second degree, and assessed his punishment at confinement at hard labor in the penitentiary for a term of five years. The prisoner appealed.

There were several questions on the admission of testimony, reserved by bills of exceptions, only one of which was deemed worthy of notice, and that is sufficiently stated in the opinion. The charge of the Court, so far as the same was peculiar to this case, was as follows:

“In case you should find the defendant guilty, as charged, the law makes it your duty by your verdict, to find whether he is guilty of murder in the first degree or murder in the second degree. Therefore, should you conclude from the proof in the cause, that the defendant, with malice aforethought, and with a deliberate and specific intent to take life, shot with a gun and killed the deceased, the law declares it to be murder in the first degree, and it will be your duty so to find.

“But if you believe that the defendant, not being moved by a wicked and malicious intent, but from a just and well-grounded apprehension, for the preservation of his own life from a threatened attack from the deceased, inflicted the mortal wound by which death ensued, then he is guilty of murder in the second degree, and not murder in the first degree, and it will be your duty so to find.

“But if you find under the proof and law given you, that the defendant took the life of the deceased in what the law calls self-defence, he, then, is guilty of no offence, and the law acquits him of all blame, and justifies the act. If the deceased threatened the defendant with an attack, the law requires that he should avoid the conflict, if he could do so without endangering his own person; if he could not avoid the difficulty, without endangering

his own person and the danger was present and pressing, then such a state of affairs, if proved to your satisfaction, justified the defendant in taking the life of the deceased, and it will be your duty to find him not guilty.

"In relation to the threats of the deceased, against the defendant, given in evidence before you, I feel bound to charge you, that they cannot be considered by you in justification of the offence charged, but may be looked to in connection with the proof in the cause (should any exist) in making up your verdict, reducing the offence from murder in the first to murder in the second degree, should such be the tendency of your investigations, under the legal rule which I before laid down in relation to the latter offence. In no case do threats, unaccompanied with actual or instantaneous meditated violence, justify the taking of human life. There must be an actual danger* at the time. In the language of the law, it must plainly appear by the circumstances of the case, as the manner of the assault, the weapons, etc., that one's life was in imminent danger; otherwise the killing of the assailant will not be justifiable self-defence."

Henderson and Jones, for the appellant; *Thomas J. Jennings*, Attorney-General, for the State.

WHEELER, J., delivered the opinion of the Court:

To reverse the judgment of conviction, it is urged that the Court erroneously excluded evidence proposed by the accused; and also that there is error in the charge of the Court.

The attorney for the State had asked a witness how the accused was "equipped" as he rode into Jefferson with the witness on the morning of the day of the killing. To which the witness answered that "he had pistols tied to his saddle;" and the defence thereupon proposed to prove by the witness that the accused "uttered no hostile

* This is not the least important error of this singular charge, although overlooked by counsel and by the Court. The law is, a reasonable appearance of danger. See *Neeley's case*, *ante*, p. 101; *Lamb's case*, *post*; *Meredith's case*, *ante*, p. 298; *Maher's case*, *ante*, p. 290, and other cases under this SUBDIVISION, for rulings upon similar errors.

expressions about the deceased, and spoke of no difficulty with any one;" which, upon objection, the Court excluded; and this is assigned as error.

The attorney for the State had not questioned the witness as to any statements or conversations of the accused at the time. And yet it is insisted that the accused had the right to prove that he did not use threatening language, or give expression to any hostile intentions toward the deceased. The proposition was to prove that the accused did not say, when there had been no question asked as to what he did say. It is scarcely necessary to say that a party could not thus make evidence for himself; that the testimony proposed was irrelevant; did not conduce to prove any fact pertinent to the issue; was no part of the *res gestæ*; nor of a conversation drawn out by examination on the part of the State; and was very clearly inadmissible.

Other similar questions upon the admissibility of evidence were reserved; but they are not deemed of a character to require more particular notice. And, indeed, the only matter presented by the record which does require notice, is the part of the charge of the Court, in which the Court treated of the effect of the previous threats of the deceased. On that subject, the Court charged that, "if the defendant, not being moved by a wicked and malicious intent, but from a just and well-grounded apprehension, for the preservation of his own life from a threatened attack from the deceased, inflicted the mortal wound by which death ensued, then he is guilty of murder in the second degree, and not murder in the first degree."

By a "threatened attack" it is evident that the Court meant the previous threats of the deceased. The Judge could have meant, and the jury could have understood him to mean nothing else; for there was no pretence of attack or threatened attack by the deceased at the time of the killing. Divested of the peculiar phraseology which obscures its meaning—that is, the expressions "not being moved by a wicked and malicious intent,"

“well-grounded apprehension,” and “threatened attack;” and viewed in reference to the facts of the case—the legal proposition which the charge announces is, that previous threats, of themselves, and unconnected with any manifestation at the time of the killing of an intention to carry them into immediate execution, will extenuate the crime and penalty of a wilful, premeditated and deliberate homicide, committed in cold blood, by one lying in wait purposely to take the life of his adversary, if the motive which actuated the slayer was the preservation of his own life from future, and of course, contingent danger, apprehended by violence from the deceased. Or, in other words, that bare, naked threats, unconnected with acts, may extenuate and reduce the crime of murder, committed by “premeditated and deliberate killing,” which the statute defines to be murder in the first degree, to murder in the second degree.

The annunciation of such a proposition from the bench is calculated to arrest attention. And it is natural to enquire upon what principle it is that this effect is ascribed to previous threats. It cannot be on the ground that they constitute what the law deems a sufficient provocation to extenuate the guilt of homicide. For that can never be where the killing is deliberate, or of cool purpose. The extenuation admitted in cases of provocation is the indulgence which the law extends to the first transport of passion, in condescension to human infirmity; to the *furor brevis* which, while the frenzy lasts, renders a man deaf to the voice of reason. And “it is the nature of the provocation, and not the mere effect of it on the mind of the prisoner which the law regards.” 2 Stark Ev., 722. Therefore, “no affront by bare words or gestures, however false or malicious, and exaggerated with the most provoking circumstances, will free the party killing from the guilt of murder.” 1 Russ. Cr., 514. And the plea of provocation will in no case avail, where there is evidence of express malice, (*Ib.*, 520), and it does not appear that the party killing acted upon such provocation. For “in all cases of provocation, in order to extenuate the

offence, it must appear that the party killing acted upon such provocation, and not upon an old grudge." Whart. Am. Cr. L., 242 "The provocation which is allowed to extenuate in the case of homicide must be something which a man is conscious of, which he feels and resents at the instant the fact which he would extenuate is committed." 1 Russ. Cr., 513-14.

It could not have been intended to invoke any principle of the law upon the subject of provocation, as having any, the remotest application to the case before the Court; or to rest the doctrine asserted as to the effect of previous threats upon this ground. For if there had been what the law regards as provocation sufficient to extenuate the crime, it could not have been murder of either degree; but would be manslaughter only. There is, if it were possible, even less, certainly not more reason in the law, for holding mere naked threats, unconnected with acts, to amount to the justification or excuse of homicide on the plea of self-defence. This defence proceeds on the ground of the justification or excuse, not the mere extenuation of homicide. It does not extenuate or reduce from one degree of crime to another, but it wholly acquits of crime. Threats communicated may excite fear; but they cannot occasion danger. They may enable the party to guard against the threatened mischief, and thus avoid the danger. But they can never afford a justification or excuse for the commission of unlawful acts; or, of themselves, justify an attack, or even an assault, much less a killing, by lying in wait with a deadly weapon.

The right of self-defence rests upon a law of necessity. It is the natural and inalienable right of every human being, and it is to be held sacred and inviolable by any law of human or civil institution. It does not depend upon any law of society. It is derived from a higher source; is coeval with man's natural being; and hence it is with truth and reason said, that self-preservation is the first law of nature. "Self-defence, therefore," says Blackstone, "as it is justly called the primary law of na-

ture, so it is not, neither can it be in fact, taken away by the law of society." 3 Bla. Com., 4. It may be rightfully exercised by every human being, whether beneath a despot's rule or on freedom's soil; whether he exists in a heathen land, or breathes beneath a christian sun. But still it is a law of necessity; and while in its just and proper exercise, it places the subject of it above and beyond the influence of the civil or municipal law; renders him irresponsible for his acts done by its permission, and not amenable to the civil authority; yet it has its limit, as well defined as is the limit of any right which a man may exercise in subordination to the laws of society; and that limit is where the necessity which gave the right ceases. The necessity and the right are, from their nature, co-extensive and concurrent. Where the necessity arises the right instantly accrues; and when the necessity ceases the right no longer exists. There is no difficulty in comprehending what is to be understood by the right of self-defence; and if none were disposed to transgress its bounds, there would have been no necessity for the enacting of laws for the prevention of wicked, malevolent and vindictive violence, or the wanton exercise of a cruel, revengeful and malignant spirit. But experience has shown that laws are necessary to ascertain and prescribe the true limit of the rightful exercise of this right of self-defence, and to restrain and punish the transgressor. The rules and principles which the law has recognized, and which it enforces, do not undertake to restrain a man's natural right, but they afford it their necessary shield and protection by the restraints which they impose on those who would abuse its exercise, and under the cover and pretence of self-defence seek occasion for the indulgence of a spirit of malevolence, cruelty and revenge. Those rules and principles have their foundation in the law of nature; they are incorporated into and form a component part of the common law; are sanctioned by the wisdom and approved by the experience of ages; they form the best exponent of the nature of the right;

and in an undeviating adherence to them, is to be found the best and only sure guaranty for the protection and preservation of the natural and inalienable right of self-defence, which human wisdom has conceived or can devise. And whenever they shall be relaxed or departed from, it will impair the estimate of the sanctity of human life, induce a loose estimate of its value, and tend to a state of society in which licentious, wanton violence may go unrestrained, brute force usurp the prerogative of the law, and every man become the avenger of his own wrongs; when no right of person or property may be esteemed sacred and inviolable, or will be enjoyed in security.

It is the necessary consequence of the right of self-defence, and therefore it is the universally received principle and maxim of the law, that "a man may repel force by force in the defence of his person, habitation or property, against one or many who manifestly intend and endeavor, by violence or surprise, to commit a known felony on either. In such a case he is not obliged to retreat, but may pursue his adversary till he find himself out of danger; and if, in a conflict between them, he happeneth to kill, such a killing will be justifiable." Whart. Am. Cr. L., 254. "But a bare fear of any of these offenses" [murder, robbery and the like,] "however well grounded, as that another lies in wait to take away the party's life, unaccompanied with any overt act, indicative of such an intention, will not warrant him in killing that other by way of prevention; there must be an actual danger at the time." 1 East's Crown Law, 272. "To justify a homicide on the ground of self-defence, it must clearly appear that it was a necessary act, in order to avoid death or some severe calamity." 2 Stark. Ev., 721; 1 Coxe, 424.* "Or, from the nature of the attack which he is forced to repel, the party killing must have had reasonable ground of belief that there was a design to destroy his life, or do him some great bodily harm." Whart. Cr. L., 258, 259-60.

* Wells' case, *ante*, p. 145.

“And in all cases of homicide excusable by self-defence, it must be taken that the attack was made upon a sudden occasion, and not premeditated or with malice.” 1 Russ., 661. “A force which the defendant has a right to resist must itself be within striking distance. It must be menacing and apparently able to inflict physical injury, unless prevented by the resistance he opposes.” *People v. McLeod*, 1 Hill, 377, 420; Whart., 260. “The belief that a person designs to kill me,” it was said in a late case in North Carolina, “will not prevent my killing him from being murder, unless he is making some attempt to execute his design, or, at least, in an apparent situation to do so, and thereby induces me reasonably to think that he intends to do it immediately.” *Ib.*; 4 Iredell, 409. “The right of resorting to force upon the principle of self-defence, does not arise while the apprehended mischief exists in machination only.” Whart., 260. “No contingent necessity will avail; and when the pretended necessity consists of the as yet unexpected machinations of another, the defendant is not allowed to justify himself by reason of their existence.” *Ib.*, 255; 1 Hill, N. Y. R., 377; 3 Iredell, 186.

There is and can be no pretence that the facts of the present case bring it within any of these rules, which ascertain and mark the limit of the lawful exercise of self-defence. There is no dispute about the facts. The accused was not the party attacked. He was the assailant; not the deceased. There is no pretence of an attack, or threatened attack, from the latter, present and impending over the accused at the time of the commission of the homicide. The accused was the sole aggressor, on that occasion. There was at the time no danger, and could have been no apprehension of present danger from the deceased; and, of course, there was and could be no present necessity, or well-grounded belief of the existence of present necessity of taking his life by the accused for the preservation of his own life. The accused did not act on the defensive. Instead of endeavoring to avoid the necessity, he sought the occasion.

Being apprised of the threats of the deceased, he went about compassing his destruction. He prepared for the occasion; unobserved, he watched, or was apprised of the movements of the deceased; was under no necessity of encountering, and did not encounter him in open combat, or on equal terms; if even that, where the occasion was sought by him, would have been a defence; but watched his opportunity, and when it was evident the deceased, if he had sought a rencounter, had given it over, at least, for the time, he pursued, and, unobserved by the deceased, took his position by the wayside, where, still unobserved, he waited his approach, and as the deceased was passing, shot him from under cover, without giving him timely notice to stand in defence of his life, or to make good his retreat; and only sufficient to embitter the last moment of his life by the consciousness that he died by the hand of his enemy. We abstain from comment. It is unnecessary. It is very evident that to denominate this a killing in self-defence would be an abuse of terms. There manifestly was no immediate danger or pressing necessity to bring it within the principle which excuses a homicide committed for self-preservation; no provocation, which the law will recognize, to extenuate or reduce the degree of the crime. There was, indeed, nothing attending, or giving character to the act which the law regards as matter in justification, excuse, or extenuation. There can be but one opinion as to the true character and degree of the crime.

Nor could the Court have intended to rest the doctrine maintained, as to the effect of previous threats, on the ground that they supported this defence. For then they would have had the effect, not merely to extenuate from the first to the second degree of murder, but they would have constituted a complete justification or excuse of the homicide; and, of course, it could not have been murder of any degree, or manslaughter; but would be justifiable or excusable homicide.

The error of the Court evidently arose from confounding previous threats with a "threatened attack," or

menacing, present danger; or, as the terms import, the manifestation by acts of a present intention of immediately attacking; and also from confounding malice in a legal sense, with malice in its popular signification, in which it is used to denote an evil or malevolent motive and disposition of the mind; and from not bearing in mind that every intentional killing of any human being, by a voluntary free agent, of sound memory and discretion, unless justified by the command of the law, excused by its permission, as in the case of self-defence; or extenuated by some sufficient legal provocation, or by being the involuntary consequence of some act not strictly lawful, is, in a legal sense, malicious; and no enquiry can be instituted into the actual motive and disposition of mind which prompted the act, except by proof of the facts which make out the justification, legal excuse or extenuation. For all homicide is presumed to be malicious, and, of course, amounting to murder, until the contrary appears, from circumstances of alleviation, excuse or justification; and those circumstances which go to alleviate, excuse or justify, it is incumbent on the accused to make out in evidence, unless they arise out of the evidence produced against him. When the law makes use of the term malice aforethought as descriptive of the crime of murder, it is not to be understood merely in the sense of a principle of malevolence to particulars, but as meaning that the fact has been attended with such circumstances as are the ordinary symptoms of a wicked and malignant spirit. 1 Russ. on Cr., 482. Malice, "in its legal sense, denotes a wrongful act done intentionally, without just cause or excuse." 1 Ib., 483, n. i., 5th Am. from 3rd London edit. "The legal import of the term" it has been said, "differs from its acceptation in common conversation. It is not as in ordinary speech, only an expression of hatred and ill-will to an individual, but means any wicked or mischievous intention of the mind. Thus in the crime of murder, which is always stated in the indictment to be committed with malice aforethought, it is neither necessary in support

of such indictment to show that the prisoner had any enmity to the deceased, nor would proof of absence of ill-will furnish the accused with any defence, when it is proved that the act of killing was intentional, and done without any justifiable cause." Per BEST. J., 2 Barn. & Cres., 268; 1 Russ., 483, n. i. "Malice in law is a mere inference of law, which results simply from a wilful transgression of the law." 2 Stark. Ev., 674. It imports simply the perverse disposition of one who does an act which is unlawful, without a sufficient legal excuse therefor; "and the precise and particular intention with which he did the act, whether he was moved *ira vel odio, vel causa lucri*, is immaterial; he acts maliciously in wilfully transgressing the law." Ib.

If the idea which the charge of the Court evidently conveys, that the real motive and disposition of mind which prompted the commission of the deed gives character to the crime and determines its degree, were the law, then there could be no homicide which might not be reduced to murder in the second degree, or even to excusable or justifiable homicide, no matter in what particular manner the homicide may have been committed. For if the motive is to govern in determining the degree of crime, then, of course, in that view it can make no difference in what manner the killing was effected; whether by lying in wait, "by poison, starving or torture," (instances given in the statute of murder in the first degree,) or by "other premeditated and deliberate killing;" or whether "committed in the perpetration or attempt" to perpetrate any of the crimes mentioned in the statute, [Hartley's Dig., Tex. Stat., Art. 501]; still the enquiry might be, By what real motive and disposition of mind the party killing was actuated; and if the jury should be of the opinion that it really was not "from a wicked and malicious intent, but from a just and well-grounded apprehension for the preservation of his own life" from future danger, it would only be murder in the second degree; and with equal reason it might be held to be neither murder nor manslaughter, but justifiable homi-

cide. For if the motive is to control, then, of course, it follows that we must search for and be governed by the true motive; and if we are at liberty to suppose that a wilful, premeditated and deliberate killing may be from any motive which the law does not deem "wicked and malicious," as the charge supposes, then we may, with equal reason, be at liberty to suppose that the real motive which prompted the act was not in the least reprehensible; and, hence, conclude that the act does not merit the punishment even of murder in the second degree, or, indeed, any punishment whatever. It may be supposed that those native tribes, who, we are told, put an end to the lives of their aged and infirm, in order to relieve them of their suffering, are not really prompted by a wicked and malicious intent, in the common acceptation of the terms. Yet no one will suppose that our law would tolerate such a plea; or suffer such a motive to be urged in extenuation of the crime. Of course it is not to be supposed that the Court ever thought of carrying the doctrine to any such extravagant length as this. The contrary is shown by the limiting of the extenuation, deduced from the real motive and disposition of the mind of the accused to murder in the second degree. But the illustrations are employed for the purpose of showing to what consequences it might lead, if the enquiry were once admitted into the real motive which prompted the act, as a ground of extenuation or excuse for the crime. It would confound all legal ideas and rules in relation to the degrees of homicide. As observed by Mr. Starkie, "Whenever the law defines a right or prescribes the performance of a duty, or prohibits a particular act, the wilful violation of the right, omission of the duty, or transgression without legal excuse, is necessarily illegal, without regard to intention; it would be manifestly mischievous, and even inconsistent with the very notion of law, as a general rule of conduct, to allow the crude opinions of individuals to supersede the force of law." 2 Stark. Ev., 673, Tit. "MALICE." "Where a defendant is proved to have done that, the malicious

doing of which is prohibited by law, malice is a *prima facie* inference from the very act, for he must be presumed to have intended to do that which he did, and an intentional violation of the law is a malicious violation of it. *Ib.* Every intentional killing without lawful justification, excuse or extenuation, is a malicious killing, amounting, of course, to murder; and "all murder committed by poison, starving, torture or other premeditated and deliberate killing," is murder in the first degree." [Hart. Dig., Tex. Stat., Art. 501.] Murder thus committed can be of no less degree. In such killing the law necessarily implies malice, from the fact of killing without lawful excuse, whatever may have been the real motive prompting to the commission of the deed.

Every intentional killing is not necessarily murder. For it may be from a principle of inevitable necessity, and then it would be self-defence; it may be done in the transport of passion and heat of blood upon a sudden and sufficient legal provocation, and then it will be manslaughter only; or it may be done by the command or permission of the law, and then it will be justifiable or excusable homicide. But if it be unattended by any of those circumstances of alleviation, excuse or justification which will relieve the party killing from the guilt of murder—if it be murder within the proper legal meaning of that term; and be a "premeditated and deliberate killing" within the meaning of those terms as employed in the statute, it will necessarily be murder in the first degree.

There can be no doubt, therefore, that the Court did err in the charge we have considered. But there is as little doubt that it was an error in favor of the appellant; one which operated in his favor, and which, under the evidence in the case, could not possibly have operated to his prejudice. And upon no principle can it be maintained that for such an error this Court would be warranted in reversing the judgment.

The cases cited by counsel for appellant (decided in Georgia and Tennessee) have not been adverted to, for

the reason that they were not deemed applicable to the questions arising in this case. In *Howell v. The State*, 5 Ga., p. 48, which was an indictment for an assault with intent to murder, the question was as to the admissibility in evidence of the threats of the party assaulted; and they were held admissible in evidence. In the present case they were admitted without objection; and, of course, there was and could be no question to be determined upon this appeal, as to their admissibility. In *Monroe v. The State*,^b *Ib.*, 85, which was an indictment for murder, the same point was raised, and it was held that "Threats accompanied with occasional acts of personal violence, are admissible to justify the reasonableness of the defendant's fears, provided a knowledge of the threats is brought home to him." But there is no opinion advanced in the case which ascribes to mere threats, unaccompanied with acts, any such effect as is claimed for them in the present case. The other is the case of *Grainger v. The State*,^c 5 Yerger, 459, which has been the subject of much comment, and, doubtless, some misapprehension as to what it was intended to decide; and its authority is, at least, questionable. *Whart. Am. Cr L.*, 260. The language of the Court seems not to have been sufficiently guarded. Nor does there appear to be any precedent or authority in the law for the general principle announced by the case. But the opinion does not treat of the question presented in the present case, and there is, therefore, no occasion to examine the doctrines it asserts. But it may be remarked, that to do justice to the judgment of the Court in that case, it is necessary to look not alone to the language of the opinion, but to the facts of the case present to the mind of the Court; and to bear in mind that the question was, not whether the accused was justifiable or excusable, (for it is evident that the Court did not intend to intimate that he was not guilty of manslaughter,) but simply whether the homicide was, under the circumstances, "of malice prepense, so as to exclude the ben-

^b *Post.* ^c *Ante*, p. 238.

eft of clergy." There is no analogy or resemblance in the facts of either this, or the other cases cited, to the present. Neither is an authority upon any question arising for determination upon the record in this case; and a more particular reference, or examination here of the doctrines they advance, therefore, would be out of place.

* * * * *

[The portion of the opinion here omitted contains an animadversion upon a statute of Texas, which restricted the amount of security for the peace which a justice of the peace might demand, to two thousand dollars.]

There is in the record no erroneous ruling adversely to the appellant. The evidence warranted a conviction upon the charge preferred in the indictment; and the judgment must be affirmed.

Judgment affirmed.

PHILIPS v. COMMONWEALTH.

[2 DUVALL, 328.]

Court of Appeals of Kentucky, Winter Term, 1865.

WILLIAM SAMPSON, *Chief Justice.*
 BELVARD J. PETERS, }
 RUFUS K. WILLIAMS, } *Judges.*
 GEORGE ROBERTSON, }

KILLING UPON APPEARANCES OF DANGER—KILLING ON SIGHT AFTER ESCAPING FROM ASSASSINATION—THREATS.

1. Where a man has been threatened with death by a vindictive, reckless and determined man, and has once escaped assassination at his hands, and his enemy has lain in wait to kill him; and they accidentally meet, and his enemy on being questioned reiterates his purpose to kill him, at the same time putting his hand in his pocket, as if to draw a pistol; and he there-

upon shoots and kills such enemy, and it afterwards turns out that his enemy had no pistol at the time, that fact does not render him culpable. [Acc. Shorter's case, *ante*, p. 256; Logue's case, *ante*, p. 269; Harris' case, *ante*, p. 276; and other cases of the same class.]

2. Under such a state of facts, it is erroneous to instruct the jury that they ought to find the defendant guilty of murder, unless they should also be of opinion that he, when he fired the first shot, had reasonable ground to believe, and did in good faith believe, that the deceased was then about to carry his threats into execution, and would do so, unless prevented by killing him, and that he had no other apparent means of escape.

3. The principle applicable to a mutual rencounter, or an affray with deadly weapons, does not apply to a case in which the first escape from threatened assassination by a determined and persevering enemy would not probably secure the ultimate safety of the accused. The party once assailed by an enemy who has threatened to kill him, is not bound to run and thereby escape that assault, leaving the danger still impending, and, perhaps, increased by the act of running. [Acc. James D. Kennedy's case, *ante*, p. 137; Carico's case, *post*; Bohannon's case, *post*; Young's case, *post*, note to Bohannon's case.]

4. It seems that under such a state of facts as those above stated, the person whose life is threatened and endangered, may kill his adversary wherever he may chance to meet him. [Acc. Carico's case, *post*.]

5. But whether he may always hunt him for that purpose, the Court do not mean to intimate. [It seems from Carico's case, *post*, that he may; but that part of Carico's case seems to be overruled by Bohannon's case, *post*.]

Hoe & Gaither; Hunt, Beck & Clark, and C. A. Hardin, for the plaintiff in error; *John A. Harlan*, Attorney-General, for the Commonwealth.

ROBERTSON, J., delivered the opinion of the Court:

Convicted and sentenced to be hung for killing, by pistol shot, his neighbor and wife's cousin, Madison Miller, the appellant, Richard Philips, appeals to this Court for a reversal of the judgment, because, as he says, he had not a fair trial—the jury being confused and misled by instructions both bewildering and erroneous.

In testing the instructions, every deduction which the jury might have been authorized to make from the testimony, must be assumed as a fact proved. Tried by this rule, the following facts characterize the case, as exhibited in the record:

1. About four weeks before the homicide, Miller, armed with a pistol, went to a field, where the appellant and

others were working, avowing his purpose to chastise a white boy then and there in the employment, and confided by his father to the care and protection, of the appellant; and the required surrender of the boy being refused, Miller, in a violent rage, pointing his pistol at the appellant, threatened to shoot him, and being, probably, prevented by the presence of others, cursed and denounced him, and asseverated that, wherever he might see him again, he would shoot him.

2. The threat was afterwards, more than once, repeated to other persons, and Miller was once seen watching for the appellant, on the road he was expected daily to travel, and avowed his purpose to kill him.

3. Miller was a man of strong passions, unrelenting resentment, and rather peculiarly bold, reckless, and inflexible in the execution of his avowed purposes.

4. On the day of the homicide, the appellant, on horseback, going with his wife and brother to his field with a scythe and cradle on his shoulder, met Miller unexpectedly, and enquiring of him whether he intended then to execute his threat, Miller answered that he did, and put his hand in his pocket, indicating an intention to draw his pistol. Whereupon, the appellant charged on him and shot him several times, until he was, apparently, dead. A rather feeble minded boy, who was with the appellant and his wife and brother, at the time of that fatal meeting, testifies to that conversation and demonstration, as the only witness, the wife being incompetent, and the brother being incapacitated by the joint indictment against the appellant and himself, without any apparent or presumable reason for joining him, unless the object was to deprive the appellant of his testimony. And, although the only remaining witness of the conversation was much confused by severe cross-examination, the jury had a right to believe him, and such belief was, therefore, hypothetically assumed in some of the instructions.

On these facts, the Circuit Court gave several instructions, rather too multifarious to be certainly understood

and rightly applied by the jury, and refused some others asked by appellant's counsel.

In two of the instructions, as given, the Court told the jury, that, if they should believe the substance of the foregoing facts, they ought, nevertheless, to find the appellant guilty of murder, unless they should be of the opinion that he, when "he fired the first shot, had reasonable ground to believe, and did in good faith, believe, that Miller was then about to carry his threats into execution, and would do so unless prevented by killing him, Miller, and *that he, appellant, had no other apparent means of escape.*"

The principle assumed in these instructions, as to the duty of escaping, we cannot recognize as either safe, sound, or maintainable as the law of the land. The principle applicable to a mutual rencounter, or an affray with deadly weapons, does not equally apply to such a case as this, in which the first escape from threatened assassination by a determined and persevering enemy, might not, and probably would not, secure the ultimate safety of the doomed victim. The law of self-defence is, in such a case, more comprehensive, conservative, and assuring. Mr. Starkie, in his second volume on evidence, side page 523, says: "The accused may also show in justification that he committed the act in self-defence. If A. manifestly intends to commit a felony on the property or person of B., by violence or surprise, B. is not obliged to retreat, but may pursue his adversary till he finds himself out of danger; and if, in the conflict, A. happeneth to die, such killing is justifiable; but, in the case of mutual conflict, the party, to excuse himself, must show that he retreated as far as he could before he gave the mortal stroke, and that he killed his adversary through mere necessity to avoid immediate death."^a

This is British law. Why, when properly understood and applied, should it not be, in principle, (without now defining the extent of its application), American law? And if the principle illustrated in the first part of the

^aAs to the right to pursue, see *ante*, pp. 230 *et seq.*

extract be sound, must it not be pre-eminently applicable to continued danger to life, reasonably and actually apprehended from persistent threats?

In such a case, an escape from immediate danger is only momentary, and may be no escape from the danger still impending, and perhaps increased; because running once may induce the assailant to believe that the assailed will never stand and manfully defend himself, and thus embolden him to renew his attacks without apprehension of any resistance perilous to himself. If the party once assailed by an enemy who had threatened to kill him, is bound by law to run, if he can thereby escape that assault, legal self-defence may become a mockery, and the sacred right itself a shadow. Like the sword of Damocles, the threatened danger is continually impending every moment and everywhere. The threatened man may be waylaid or otherwise attacked unawares, without the possibility of defence or escape, and may never, day or night, feel safe, or actually be so, while his enemy lives: who, whenever he may see him, or wherever he can *find* him, may be anxious and able to kill him. And does either human or divine law require such prolonged agony and peril? Or can the best and most prudent men suicidally forbear to strike for riddance, if they have the courage to defend themselves *in the only way of secure and lasting escape*? Starkie says no, and we, too, say no. Whether, *in such a case*, the threatened man, anticipating the attack, may always hunt his enemy and kill him in self-defence, we do not mean to intimate. It is sufficient for this case to decide, that, if the appellant had reason to apprehend and did apprehend that Miller would shoot him, unless he could run away, or shoot Miller first, the law does not require him to run away and be shot, perhaps, in the back, or afterwards secretly assassinated, but justified his taking Miller's life. And if he believed that Miller was drawing out a pistol to shoot him, the fact afterwards developed that Miller had *then* no pistol, but was only manœuvring to make him run, cannot make him culpable for doing what he had

good reason to believe was necessary for either the immediate or ultimate security of his life. It is evident that the appellant had not been seeking, but rather eluding, Miller, whose vindictive passion and bloody purpose seem to have been not only unjustifiable, but causeless. Did the public interest or the reason of the law require the appellant to continue to skulk and endure the agony of impending death as long as Miller might seek his life? This cannot be. Then why, if the testimony be true, was it his duty, when he met Miller, ignominiously to flee and thereby prolong and increase his peril? This was not the way to save himself or to "escape" being shot in the dark, at home or abroad, by stealth or surprise, when self-defence would be impossible. And unless he could, by running, have escaped all these continually impending perils, why should the law require him to run? Regard for his own life would not allow it, and, as a proper man and prudent citizen, he was not bound to do it. And the example of such humiliating and imperiling recreance would do more harm than good to the public security and peace.

We are of the opinion, therefore, that, as hereinbefore indicated, the Circuit Court radically erred.

Wherefore, the judgment of conviction is reversed, and the cause remanded for a new trial, when, if the appellant be guilty, he may be punished justly, according to the laws of his country.

Judgment reversed.

CARICO v. COMMONWEALTH.

[7 BUSH, 124.]

*Court of Appeals of Kentucky, Summer Term, 1870.*RUFUS K. WILLIAMS, *Chief Justice.*

GEORGE ROBERTSON,	} <i>Judges.</i>
MORDECAI R. HARDIN,	
BELVARD J. PETERS,	

MURDEROUS THREATS—LYING IN WAIT AND KILLING THE THREATENER.

1. Where there was proof tending to show that the deceased, without any reasonable cause, became exceedingly hostile to the defendant; assaulted him more than once with deadly weapons; frequently declared that he would kill him; and the evening before the catastrophe, said that he would kill him before the next night; and where it appeared that about four o'clock in the morning succeeding the last threat, the deceased, after passing the appellant's office, on his way to his own stable, apparently for the purpose of feeding his horse, without making any apparent demonstration of an immediate assault, and without seeing defendant, was shot in the back by him and killed; and the jury were instructed that, whatever deductions they might make from the evidence, and however assured the accused may have felt that his life was in immediate and continual danger, nevertheless, he had no right to shoot as, and when he did, unless there was *then* imminent danger of an immediate and violent assault on him by the deceased;—*it was held*, on the authority of *Philips v. Commonwealth, ante*, last case, which is an episode to this case, that the instruction was erroneous. [HARDIN, J., doubting, and PETERS, J., dissenting.]

2. The principle is laid down in this case, that if a man feels sure that his life is in continual danger, and that to take the life of his menacing enemy is his only security, he may kill that enemy whenever and wherever he gives him a chance, and there is no sign of relenting. [Acc. *Philips' case, ante*, last case. Overruled in effect by *Bohannon's case, post*, next case. Contra, *Rippy's case, ante*, p. 345; *Williams' case, ante*, p. 349; *Evans' case, ante*, p. 329; *Wesley's case, ante*, p. 319; *Dyson's case, ante*, p. 304; *Scott's case, ante*, p. 163; *Hinton's case, ante*, p. 83; *Harrison's case, ante*, p. 71; 1 East P. C., 272; 1 Hale P. C., 52.]

3. But before a jury should acquit, they should be well satisfied that the killing was not the offspring of bad passion, but solely of a thorough and well-founded belief that it was necessary for security.

4. The accused had a right to prove that a man, then dead, had but a short time before the homicide, told him that the deceased had armed himself with a shot-gun to kill him. This was not legal evidence of deceased

arming himself to kill accused, but it was competent to prove that accused had so heard, and may have had a right so to believe; and to that extent and for that purpose, it was admissible. 1 Greenl. Ev., §§ 100, 101.

W. D. Harrison, for appellant; *John Rodman*, Attorney-General, for the Commonwealth.

ROBERTSON, J., delivered the opinion of the Court—Judges HARDIN and PETERS delivering separate opinions.

The appellant, John W. Carico, a young physician, residing in the village of Fredericksburg, Washington county, Kentucky, indicted for murder in killing his neighbor, David Smith, "by shooting him with a gun," was found guilty by a jury and sentenced to confinement in the penitentiary for six years. He urges a reversal of the judgment for alleged error in instructions, and in the exclusion of testimony by the Circuit Court on the trial. The appellant attempted to excuse the homicide by the proof of circumstances conducing to show that Smith, without any reasonable cause, became extremely hostile to him; assaulted him more than once with deadly weapons; frequently declared that he would kill him; and the evening before the catastrophe said that he would kill him before next night. About four o'clock in the morning succeeding that last threat, Smith, after passing the appellant's office on his way to his own stable, apparently for the purpose of feeding his horse, was shot in the back and killed by appellant, without any apparent demonstration of an immediate assault on the appellant, and without seeing him. The testimony marks Smith as a man of violent passions and inflexible will, and characterizes the appellant as a moral, quiet, and prudent gentleman in his antecedent behavior.

The shooting being before the dawn of day, the jury might possibly have inferred, from the unusual time and all the other facts, that Smith's purpose in being out so early was to reconnoiter for a secret chance to assassinate the accused before he was up in his office, and that the latter was so prematurely ready with his loaded musket only to meet such a night attack, and that seeing

Smith, he apprehended his speedy return to execute his threats.

On these facts, the Circuit Judge by his rulings, adjudged that whatever deductions the jury might make from the evidence, and however assured the appellant may have felt that his life was in immediate and continual danger, nevertheless he had no right to shoot as, and when he did, unless there was *then* imminent danger of an immediate and violent assault on him by Smith. This insured the verdict, and sealed the appellant's doom; and whether that decision was right or wrong, is the ruling question on this appeal.

This case is an episode to that of *Philips v. The Commonwealth*,* 2 Duvall, 328, in which this Court adjudged the philosophy of the law of self-defence, which we still approve and now reaffirm. In that case, we could not judicially extend the principle therein defined and recognized to a homicide exactly like this; and, therefore, we expressly forbear even an intimation of an opinion as to such extension. The application of the principle is a difficult task for a jury, and is peculiarly hazardous. But its liability to perversion or abuse by juries cannot curtail the principle itself as a law for the Court.

Speaking of assured and continual danger to life, this Court, in the case in 2 Duvall, defined the principle of self-defence, as follows: "Like the sword of Damocles, the threatened danger is continually impending *every moment and everywhere*. The threatened man may be waylaid, or otherwise attacked unawares, without the possibility of defence or of escape, and may never, *day or night, feel safe, or actually be so*, while his enemy lives: who, whenever he may see him, or wherever he may find him, may be anxious and able to kill him. And does either human or divine law require such prolonged agony and peril? or can the best and most prudent men suicidally forbear to strike for riddance,

* *Ante*, last case.

if they have the courage to defend themselves, in the only way of secure and lasting escape?"

Now, if a man feels sure that his life is in *continual danger*, and that to take the life of his menacing enemy is his only safe security, does not the *rationale* of the principle as thus defined, allow him to kill that enemy whenever and wherever he gives him a chance, and there is no sign of relenting? *But before a jury should acquit, they should be well satisfied that the killing was not the offspring of bad passion, but solely of a thorough and well-founded belief that it was necessary for security.* And here lies the danger of misapplication. It is difficult to be assured that the act was *thus necessary and done in good faith.* Of that, however, the jury, and not the Court, must judge; and in that judgment, they cannot be too self-poised and careful, before they conclude that the peril of the accused was *imminent and incessant*, and that he, *well assured of it, honestly believed that his only safe remedy* was to destroy the power to execute the threats. And if he was authorized to believe, and did *considerately* apprehend that his own exile or the death of his persevering enemy, watching to kill him, was like the *tabula in naufragio*, the only safe mode of rescue, might he not lawfully choose his remedy and throw his enemy overboard? Why should he be required still to wait an assault, and to endure longer haunting and hazard, when he might at any moment become the victim of his own forbearance, and when self-defence might be impossible or unavailing? Why let the sword still hang over him? Why not remove it out of sight *when he may*, and not passively linger until it *unexpectedly* falls and strikes his heart unresisted? The recognition of a perfect right to do so, in such a crisis, appears to us consistent with both principle and policy. It seems to us conservative. It might afford more security and prevent more assassinations than the lame law of punishment ever could, and the manly and opportune assertion of this universal birthright may teach the reckless, who

thus maliciously beset the pathway of the peaceable, that they will be likely to bring destruction on their own heads. This preventive principle will go hand in hand with civilization and philosophical jurisprudence as a *palladium* of personal security and social order and peace. Properly guarded, it may do more good than harm.^b

Whether this case comes within the range of that principle we have no right to say. But assuming, as the Circuit Court ought to have done, everything which the facts conduced to prove, that Court ought not to have denied their right, on their own peculiar responsibility, to acquit the appellant on their own construction of the evidence and rational deductions, as hypothetically assumed in some of the overruled instructions. Consequently, if we are right, the Circuit Court was wrong, and erred in rendering judgment on the verdict.

But there is a minor error which might alone justify a reversal. The appellant offered to prove that a man named Offert, then dead, had, but a short time before the homicide, told him that Smith had armed himself with a shot-gun to kill him.

The Circuit Court adjudged this inadmissible, as hearsay. What Offert said was not legal evidence of Smith's arming himself to kill appellant; but it was competent to prove that the appellant had so heard, and may have had a right so to believe, and to that extent, and for that purpose, it was admissible. 1 Greenl. Ev., §§ 100, 101.^c

For the foregoing causes the judgment of conviction

^b It is seen that the doctrine here enunciated is not concurred in by the other members of the Court, and is discountenanced in Bohannon's case, next following. It is entirely unnecessary to cite authorities to show that it has never been the law in England or in this country. As was justly remarked by CARUTHERS, J., in Rippy's case, *ante*, p. 345, "there is no authority for such a position. It would be monstrous. No court should for a moment entertain or countenance it. The criminal code of no country ever has, nor, as we presume, ever will give place to so bloody a principle."

^c In Bohannon's case, next, *post*, it is said, that this was the ground on which this case was decided.

is reversed, and the cause remanded for a new trial, conformable with the principles of this opinion.

The concurrence of HARDIN, J., in the foregoing opinion, was qualified by him as follows :

Judge HARDIN entertains views of the case of Philips v. The Commonwealth,^d 2 Duvall, 328, which would lead him to concur in overruling it to some extent; but as it is adhered to by the majority of the Court, and can not therefore be overruled, he recognizes it as authority, as he does other adjudications of this Court which have not been overruled; and he regards at least one of the instructions which were given in this case for the Commonwealth, and the action of the Court in refusing others, as conflicting with the controlling principles and reasons of said case of Philips. But without elaborating his own views on this branch of the case, or fully concurring in the foregoing opinion of Judge ROBERTSON, he is satisfied that the Court below erred to the prejudice of the defendant, in refusing to permit him to prove the fact, that shortly before the shooting he was informed by a person, since dead, of threats of Smith to take his life. The question of the admissibility of this evidence did not depend on the truths of the statement made to the defendant, but on the effect which it might produce upon his mind, as an inducing cause for more prompt action on his part, to prevent the apprehended danger. 1 Greenl. Ev., §§100, 101. He therefore concurs in the reversal of the judgment.

The following is the opinion of PETERS, J., dissenting in part, from the foregoing :

Believing as I do, that the facts of this case do not bring it within the principle decided in the case of Philips v. Commonwealth, I cannot concur with my brothers, either in their reasoning or conclusions, in condemning the instructions given by the Circuit Judge in this case; but as the case is reversed by concurrence of a majority of the Court, and a new trial will be the

^d *Ante*, last case.

result, I will forbear entering upon an analysis of the evidence, and a comparison of the facts in this case with those in the Philips' case, as such a course of argument might be prejudicial to a fair trial.

On the question of the competency of the evidence offered on the trial and rejected by the Court, which is fully stated in the separate opinion of Judge HARDIN, I think, according to the weight of authority, the evidence was competent, and should have been admitted, and to that extent only, I concur with the other members of the Court.

Judgment reversed.

BOHANNON v. COMMONWEALTH.

[8 BUSH, 481.]

Court of Appeals of Kentucky, Winter Term, 1871.

WILLIAM S. PRIOR, *Chief Justice.*
 MORDECAI R. HARDIN, }
 BELVARD J. PETERS, } *Judges.*
 WILLIAM LINDSAY,

**MALICE AFORETHOUGHT—SHUNNING ADVERSARY—KILLING TO WARD OFF
 THREATENED ATTACK—KILLING AFTER ATTEMPTED ASSASSINATION AND
 CONTINUED THREATS.**

1. In a prosecution for murder, where the defendant relies upon the plea of self-defence, it is error to instruct that malice aforethought means a predetermination to kill, however suddenly formed in the mind of the person killing. To constitute murder, the killing must be unlawful, as well as predetermined.

2. The law of self-defence does not require one whose life has been threatened to leave his home, or to secrete himself to avoid his foe. It is, therefore, error, in such a case, to instruct that the right of self-defence not arise until the defendant has "done *everything* in his power to find the necessity" of slaying such foe. [Acc. Philip's case, *ante*, p. 383; *tra*, Sullivan's case, *ante*, p. 65; Shippey's case, *ante*, p. 133.]

3. Fear grounded upon threats, or upon information that one lies in wait, will not justify the party so threatened or endangered, in killing his antagonist, unless the threats or lying in wait have been accompanied by

an actual attempt to kill or commit some other known felony; and not then, unless the person so circumstanced believes, and has reasonable ground to believe, that the presence of his enemy puts his life in imminent peril, and that he can escape such peril in no other way.

4. One whose life has been threatened and who has been attacked with a deadly weapon, may arm himself to resist his foe; may leave his home for any legitimate purpose, and if he casually meets such foe, having good reason to believe him to be armed and ready to execute his threats, and that his personal safety can be secured in no other way, he need not wait to be assaulted, but may secure himself from the impending danger, even by killing his adversary, if it be necessary to do so. [Acc. Phillips' case, *ante*, p. 383; Carico's case, *ante*, last case. *Contra*, Scott's case, *ante*, p. 163; Harrison's case, *ante*, p. 71; Creek's case, *ante*, p. 253; Dyson's case, *ante*, p. 304; Cotton's case, *ante*, p. 310; Rippy's case, *ante*, p. 345; William's case, *ante*, p. 349; Robert Jackson's case, *post*; Evans' case, *ante*, p. 329.]

5. It is erroneous to instruct the jury in a trial for homicide, that they cannot acquit the defendant on account of any danger, real or apparent, not existing, or not on reasonable grounds believed by the defendant to exist, and to be about then to fall upon him at the time of the killing. [Acc. Phillips' case, *ante*, p. 383; and see the cases there cited.]

6. The opinion in Phillips v. Commonwealth, *ante*, p. 383, is reaffirmed in so far as it conforms to the views of the law of self-defence, as expressed in the opinion in this case.

7. The opinion in Carico v. Commonwealth *ante*, last case, held not to be binding authority upon the law of self-defence, as it merely expresses the opinion of one judge upon that branch of the law.

P. U. Major, Robinson and J. P. Foree for appellant;
John Rodman, Attorney-General, for the Commonwealth.

LINDSAY, J., delivered the opinion of the Court:

At the September term, 1871, of the Shelby Circuit Court, Hiram Bohannon was indicted, tried and convicted for the murder of Addison Cook. His motion for a new trial was overruled, and from the judgment of that Court, sentencing him to be hung, he prosecutes this appeal.

The deceased is shown by the evidence, to have been a man of lawless habits, overbearing, revengeful and vindictive, and resolute and determined in the execution of his plans of vengeance, against those who incurred his hostility. The testimony also conduces to show that he was at the head of a secret organization, which habitually set the laws of the Commonwealth at open defiance, and the members of which, under the pretence of inflict-

ing punishment upon criminals who could not be reached by the process of the law, were themselves guilty of the commission of both penal and criminal offences.

Several months before his death, for reasons not fully explained, Cook became the avowed enemy of the appellant. He more than once openly threatened to take his life. Of these threats Bohannon was informed. On the Saturday before the killing, which took place on Tuesday, the 15th day of August, 1871, Cook, in company with one Penn, and evidently in the execution of a pre-concerted plan, with a drawn pistol, attacked Bohannon upon the public highway, and the latter only succeeded in escaping assassination by deserting his horse, and concealing himself in the fields adjacent to the road. The assailants then pursued the witness, Blakely, and his wife, who were in company with Bohannon, and who resided at his house; and when they had overtaken them, Cook compelled Mrs. Blakely to retract certain statements she had made relative to his being the chief of a lawless organization known as Ku-klux, threatening her with immediate death in case she refused to make the required retraction. He then announced to Mrs. Blakely and her husband, that he intended to kill Bohannon on sight.

This threat they communicated to Bohannon that night. They also gave him a detailed statement of Cook's conduct at the time it was made.

On the morning of the killing, and but a short time before it took place, Cook asked a witness named Hamilton whether he could not frame some excuse for going to Bohannon's house, and ascertaining his whereabouts, stating that he was anxious to ascertain that fact.

On that morning, Bohannon left his house, so far as the evidence shows, for the first time after he was attacked on the Saturday before. He took with him a double-barrelled shot-gun. The deceased and the appellant met in the railroad cut near the village of Bagdad. Two shots were heard in quick succession. No one saw the encounter. Cook was found a few minutes afterwards,

lying dead by the side of the railroad track, with a revolving pistol in his pocket about half-way out. The shot had taken effect in the back of his head and neck, and in his body between the shoulders. Bohannon was seen coming from the spot where the shooting was done, and, in reply to a question, said that "he had shot a thief who had run him out of the road a few days before, but that he would not run anybody else out of the road again."

Upon these facts the Court gave the jury a series of carefully prepared instructions, eleven in number, and refused all that were asked by Bohannon. It is complained that several of the instructions given are erroneous, and that, taken together, they were misleading, and prejudicial to the substantial rights of the appellant.

By the first instruction the jury were told that "by the term malice aforethought is meant a predetermination to kill, however suddenly or recently formed in the mind of the person killing before the fatal act, so that the determination actually exists in the mind before and at the time of the killing, and be not prompted alone by the first transport of passion, and under great provocation." If the plea of self-defence had not been relied on, and the sole effort of the appellant had been to reduce the killing from murder to manslaughter, this definition might not have been calculated to prejudice his rights; out standing as it does, without any subsequent modification or explanation, it is in effect a determination by the Court, that killing in necessary self-defence of one's person or property may be killing with malice aforethought, and, therefore, legally murder. A killing, to constitute murder, must be done unlawfully, and unless it be unlawful, it cannot have been done with malice aforethought, although it may have been predetermined.

A party upon whom a murderous assault is made, when there are no other apparent means of escape, may determine to defend himself without attempting to flee. and if necessary, to kill his assailant; and if, pursuant to this predetermination suddenly formed, he does kill,

it will be neither a malicious nor unlawful, but an excusable homicide. 3 Greenl. Ev., § 550; 1 East's P. C., 271.

By the seventh instruction the jury were told that "the right of self-defence is founded on necessity, and cannot be exercised in any case, or to any degree, not necessary. No instrument or power beyond what is necessary is to be used; *and when one expects to be attacked, his right to defend himself does not arise until he has done everything in his power to avoid the necessity.*"

Human life cannot be taken by way of personal defence, only in extreme or apparently extreme necessity. But when the attack is made with felonious intent against the person, the party attacked is not bound to flee. * *

When a known felony is manifestly about to be committed upon the person of a man, by violence or surprise, he is not bound to flee; but may even pursue his adversary until he is out of danger, but no further, and if death result in the conflict, he will be guiltless. * * * *

So, if it was manifest that decedent was about to commit one of these felonies (murder, manslaughter or malicious wounding,) by violence or surprise, upon the person of defendant, and he shot decedent, solely to prevent the commission of such felony, he shot justifiably, and was not bound to attempt to escape by retreat or otherwise."

The eleventh instruction is in these words: "You cannot acquit the defendant on account of mere threats made by decedent against the defendant, unless you believe from the evidence that at the time he fired the fatal shot, if he did fire it, the decedent was making some demonstration, from which the defendant had reasonable grounds to believe, that the decedent was then about to put his threats into execution, by killing the defendant or inflicting upon him some great bodily harm."

It was misleading to instruct the jury, under the proof in this prosecution, that Bohannon's right of self-defence did not arise until he had "*done everything in his power to avoid the necessity*" of slaying his adversary. He might have avoided such necessity by secreting himself

* This is the language of Justice JOHNSON, Sullivan's case, *ante*, p. 69.

so that he could not be found, or by abandoning his home and seeking safety in some remote part of the country; but under the law, he was not required to resort to either of these methods of securing his personal safety.

Instruction No. 11 will be considered in conjunction with others given by the Court after the submission of the case to the jury.

After considering the case for some considerable time, at their own request they were conducted into court by the Sheriff, and enquired of the Court: "Whether to exonerate the defendant from guilt on account of the killing, they must confine themselves to the time of the killing, and disregard all danger that formerly existed, all danger in the future, and all previous threats?"

The Court instructed in answer to this question:

1. "That they cannot acquit the defendant on account of any danger, real or apparent, not existing, or not on reasonable grounds believed by the defendant to exist, *and to be about then to fall upon him at the time of the killing.*

2. "They should not disregard previous threats, but should regard and weigh them so far as they may shed light on the question as to the real or apparent danger defendant was in at the time he did the killing, if he did it, and also as to whether he did the killing with malice aforethought, or without malice.

3. "The jury asking whether they are to regard only the circumstances occurring immediately at the killing, and to disregard all other testimony in the case, are instructed that they are to regard and weigh all the testimony in the case."^b

The first of these three instructions is in direct conflict with the law of self-defence, as laid down by this Court in the case of Philips,^c 2 Duvall, 328, and also in the case of Young,^d 6 Bush, 312.

^b For the construction of a similar instruction, see Johnson's case, *post*.

^c *Ante*, p. 383.

^d Young v. Commonwealth, 6 Bush, 312. Court of Appeals of Ken-

The first of these cases has been the subject of much criticism, not so much on account of the conclusions of the Court on the point actually decided, as of the argument of the writer in support of these conclusions. This argument is merely dictum, and not entitled to be regarded as authority, and valuable only to the extent it accords with the reason of the law of self-defence.

We adhere to the ruling of the Court in that case, in so far as it was decided that the principle of self-defence

tucky, Winter Term, 1869. The defendant was indicted for the murder of Jack McHone, found guilty and sentenced to be hung. He appealed.

Extract from the opinion of the Court, delivered by PETERS, J. :

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The deceased had, on several occasions, in the presence of different persons, threatened to take the life of the appellant; the threat made at one time at least, was communicated to him. What gave rise to these threats does not appear in proof; nor does it appear that the parties had ever been engaged in a personal altercation previous to the difficulty which terminated so fatally. On the evening of the homicide, appellant was at home, quietly taking his supper with his own family, when the deceased was seen approaching the house. When first seen, he was not recognized by appellant, as he at first said it was his uncle, Thomas Young, and then that it was a Mr. Pendleton, as W. Wilder, a witness for the Commonwealth, proves; he came near the house, and appellant then went into the yard, and immediately after leaving the house, without any words having passed between them, deceased fired a pistol at appellant, which he had brought with him. Young then went into the house, met Thomas Young near the door with a gun, and after a short struggle, succeeded in getting the gun, and went under a shed, as the witness describes it, near the door, and while there, deceased fired his pistol again at him, and Young then shot at him; neither shot took effect. Deceased started back in the direction he had come, cursing appellant, and inviting him to follow him. After having gone near a half mile, as the deceased was ascending a small hill in the road about one hundred yards in advance of appellant, the latter shot at him but missed him, and deceased having passed the summit of the hill, was out of sight, and the pursuit then ceased; but appellant remained near a fence and not far from Wilder's house. In a very short time after the last shot, deceased returned, his father with him, on horseback, both riding the same horse, cursing and hallooing, saying to the Youngs, "If you are fighting men, stand up and fight." Deceased jumped off the horse with his pistol in his hand, and ran towards the appellant and got on the fence, when, perhaps by the turning of a rail, he let go the fence and started to the house of Wilder, and was shot by the appellant near the door. Whether he had been in the house and was returning, or was approaching to go in, does not very satisfactorily appear; the witnesses differ on that point.

It is perfectly certain that appellant was neither seeking nor expecting a difficulty with the deceased, but, quietly at home in the bosom of his

does not equally apply in cases of mutual rencounters or affrays with deadly weapons, and one like this, where the life of the accused has been threatened by a lawless, determined and vindictive enemy, when he has actually been assaulted with deadly weapons and compelled to fly for safety, and when, after he has thus escaped, this enemy announces to the members of his own family the intention to take his life whenever and wherever he may find him.

This distinction is recognized by all the standard writers upon English criminal law. It is thus stated by

family, where he had a legal right to remain unmolested and secure, he was sought by deceased, for the purpose, as his conduct proved, of executing his threatened vindictive purpose; and if he had in the first attack fallen by the hand of the man he had so causelessly assailed, it can be scarcely doubted it would have been excusable homicide in Young. But whether, after his adversary had apparently declined to continue the fight and turned to leave, he did not become the assailing party in the succeeding difficulty, is the only remaining question.

In *Philips v. Commonwealth*, 2 Duvall, 328, this Court said the principle applicable to a mutual rencounter or an affray with deadly weapons, does not equally apply to such a case as this, in which the first escape from threatened assassination by a determined and persevering enemy might not, and probably would not, secure the ultimate safety of the victim. The law of self-defence is in such a case more comprehensive, conservative and assuring; and after quoting from 2 Starkie on Evidence, side page 523, say, if the principle illustrated in the first part of the extract be sound, must it not be pre-eminently applicable to continued danger to life, reasonably and actually comprehended from persistent threats?

Applying these principles to the present case, if appellant had sufficient reason to comprehend, and did actually comprehend, that McHone would take his life, or that he was in continual danger of losing his life or suffering great bodily harm from him, and that if he returned to his house the attack would be renewed upon him, he had a right to pursue his enemy, until he might reasonably believe he was secure from danger. And if, after having stopped the pursuit, the deceased returned and again assaulted him with deadly weapons, and he had cause to believe, and did actually believe, from his persistent attacks and previous threats, he would take his life or do him great bodily harm, and he slew him after having been assaulted, it was excusable homicide in self-defence. The instructions given to the jury were in conflict with the principles here enunciated, and prejudicial to appellant.

* * * * *

Judgment reversed.

As to the right to pursue touched upon in this case, see note to *Stoffer's case*, ante, pp. 230 et seq.

East, 1 P. C., 271, 272: "A man may repel force by force in defence of his person, habitation or property, against one who manifestly intends or endeavors, by violence or surprise, to commit a known felony, such as rape, robbery, arson, burglary, or the like. In these cases, he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger; and if he kill him in so doing, it is justifiable self-defence; as, on the other hand, the killing by such felons will be murder. But a bare fear of any of these offences, however well grounded, as that another lies in wait to take away the party's life, unaccompanied by any overt act indicative of such an intention, will not warrant him in killing that other, there being no actual danger at the time."

The doctrine of this author seems to be, that fear, though grounded upon the fact that one lies in wait to take a party's life, or upon the murderous threats of a desperate and determined enemy, will not, in the absence of actual danger at the time, justify the party so endangered or threatened, in slaying his adversary. But that when this lying in wait or these threats have been accompanied by an actual attempt to kill, and from all the attendant circumstances, the party in danger believes, and has the right to believe, that he can escape the constantly impending danger, which becomes imminent whenever his foe is present, in no other way except to kill such foe, he is not obliged when he may casually meet him, to fly for safety, nor to await his attack.

However this may be, the threats of even a desperate and lawless man, do not, and ought not to authorize the person threatened to take his life; nor does any demonstration of hostility short of a manifest attempt to commit a felony, justify a measure so extreme. But when one's life has been repeatedly threatened by such an enemy, when an actual attempt has been made to assassinate him, and when, after all this, members of his family have been informed by his assailant that he is to be killed on sight, we hold that he may lawfully arm

himself to resist the threatened attack. He may leave his home for the transaction of his legitimate business, or for any lawful and proper purpose; and if, on such an occasion, he casually meets his enemy, having reason to believe him to be armed and ready to execute his murderous intentions, and he does believe, and from the threats, the previous assault, the character of the man, and the circumstances attending the meeting, he has the right to believe, that the presence of his adversary puts his life in imminent peril, and that he can secure his personal safety in no other way than to kill him, he is not obliged to wait until he is actually assailed. He may not hunt his enemy and shoot him down like a wild beast; nor has he the right to bring about an unnecessary meeting in order to have a pretext to slay him; but neither reason nor the law demands that he shall give up his business and abandon society to avoid such meeting. The instructions under consideration are inconsistent with this view of the law, and are therefore deemed erroneous.

It is complained that incompetent and illegal testimony was permitted to go to the jury; but as the alleged error will not likely occur on the next trial of the appellant, it is not necessary that we should pass upon it. So far as any portions in the opinion in Philips' case are inconsistent with this opinion, the same are overruled. In the Carico case, 7 Bush., 124, the judgment of the Circuit Court was reversed upon a question growing out of the refusal of said Court to admit certain legal testimony. Judge HARDIN, while expressing his inclination to overrule the Philips' case to some extent, recognized it as authority until overruled by this Court, but did not fully concur in the opinion of Judge ROBERTSON as to the law of the Carico case; and Judge PETERS declined to express any opinion upon that branch of the case discussed by Judge ROBERTSON, believing that the facts did not bring it within the principle decided in the Philips' case.

For these reasons, it is manifest that the opinion of Judge ROBERTSON, so far as it relates to the principle of

self-defence, is but an expression of his individual views, and not binding upon this Court.

For the errors pointed out in this opinion, the judgment appealed from is reversed, and the cause remanded for a new trial upon principles consistent herewith.

Judgment reversed.

NOTE.—The force of the three preceding cases would seem to be, that where a person has once escaped from assassination, and his enemy still persists in his murderous designs, he is not obliged to retreat from or avoid his enemy, but may kill him wherever in his lawful way he may chance to meet him. This last case would seem to modify the conclusions of ROBERTSON, J., in Carico's case, only so far as to hold that a man may not, even under the circumstances above stated, seek his enemy to kill him.

These cases seem to stand alone, unsupported by any other cases in the books, old or new. They enunciate new and startling doctrines, calculated to arrest attention, and apparently dangerous to the peace of society. They appear to have extended to dangerous limits the doctrine enunciated by Mr. East and other common law writers, that a man who is feloniously assailed, may pursue his assailant until he has secured himself from all danger. We have discussed this question of the right to pursue after felonious attempts, in the note to Stoffer's case, *ante*, pp. 230 *et seq.*, and consequently shall not enlarge upon it here. We think, however, that it is as plain as anything can be, that this right continues only while the danger continues immediate and impending, or apparently so to a reasonable man, and that the expression of Mr. East, "until he finds himself out of all danger," is to be understood as meaning, "until he finds himself out of all present danger of a renewal of the attack." This principle is declared in Dyson's case, *ante*, p. 304, and is to be inferred from the analogy of nearly every case in the books on this subject. As soon as the immediate danger has ceased, it is his duty to call in the preventive arm of the law, which, in every well organized society, stands ready to secure the safety of the citizen against threatened danger. But suppose that preventive arm is paralysed? Suppose that the community at large and the ministers of the law are kept in a state of terror and duress, by lawless bands of desperate men secretly organized—and may have been the state of facts in the principal case—shall the same strict rules, defining the moment when an assailed person may lawfully strike in his defence, be held to apply, that obtain where society is well organized and the laws promptly enforced? If Sergeant Hawkins could see a distinction between the right to kill in self-defence where one is attacked in the highway, and where he is attacked in a town, ought there not to be a much greater distinction between the right of defence in states of society where the laws are rigidly enforced, and where they are enforced so feebly that lawless bands are permitted to take the lives of peaceable citizens with impunity? That such a state of things exists in any settled part of our country at the time of this writing, we do not mean to intimate; but that such a state of things does exist in some of our unsettled territories, and has existed in some of the

older States, within a recent period, we are all well aware. Rules which would be just and salutary in the island of Great Britain, where the arm of the law is never relaxed, would surely be held inapplicable, in their full extent, to a state of society like that here indicated. It is universally conceded that the right of self-defence is not derived from the municipal law; but that all that the law attempts to do is to restrain it within those limits which are deemed most salutary, having in view the good of all the members of the society whose safety and welfare it is its province to guard. Foster, 273, 274; Ruth. Inst., B. I., ch. 16; 1 Bish. Crim. Law, §841, 5th Ed.; 3 Bla. Com., 4.

Where the threatened injury is so near that there is no time to appeal to the law for its prevention, and so great that the law will be unable to afford any indemnity if it is suffered, the right of private defence exists as perfectly as in a state of nature. And with equal reason, if the law is unable, or its ministers unwilling, to accord the citizen that degree of protection and indemnity which it promises, he must be considered as being remitted in some degree to a state of nature, in respect of his right of defence. What that right of defence is, in a state of nature, we shall not stop to discuss. We may, however, be permitted to digress so far as to state that the conclusion of Dr. Rutherford seems more consistent with reason than any other. It is, that the right of self-defence in a state of nature, has but one limit, and that is the warding off of the threatened injury; and that for this purpose, it is lawful for the assailed to exert whatever degree of force the violence of the assailant puts upon him; and that he is in no wise culpable, notwithstanding the injury inflicted by this necessary force upon his assailant may have been entirely disproportionate to the injury he would have suffered, had he forbore to exert his right of defence. Ruth. Inst., B. I., ch. 16.

These considerations, no less than the reasoning of the three preceding cases, point to the extreme difficulty of laying down fixed rules on the subject of homicide in self-defence, which shall be held applicable to all cases. And it would be difficult to say that a state of facts and condition of society did not exist, which warranted the application of the extreme rules which these cases enunciate. For manifestly, whatever general rules it may be necessary or expedient for Courts and text writers to lay down, the determination of each particular case must, in a great measure, depend upon its own exigencies. Thus, though the doctrine of the right to shoot an adversary "on sight," who threatens and seeks one's life, without waiting for an overt act, is, except in the above cases, universally repudiated as a rule of law; yet there are manifestly, cases to which Courts should, and juries surely would, apply even this rule. For instance, there are in some parts of the American Union, desperate characters, whose hands are well known to be stained with the blood of many murders; who are the constant terror and dread of every community in which they may happen to abide; who take human life on slight provocation, and frequently on no provocation whatever; and who generally kill by taking undue and cowardly advantage of their victims. Now, if one of these desperadoes should threaten to kill a peaceable citizen "on sight;" should be foiled in an attempt to kill him; and should afterwards lie in wait for him, or hunt him for the purpose; and they should accidentally meet; and the peaceable

citizen, without waiting for the desperado to draw his weapon, or without passing by and running the risk of being shot in the back, should instantly shoot and kill him; no court could with reason say that this was not self-defence, and no jury, not composed of a clan of outlaws, would convict him of any crime. And yet this would amount to nothing more than that there are cases in which a person threatened with death may kill him who threatens "on sight." The simple fact of meeting such an adversary under such circumstances, would perhaps, be of itself, an overt act. Robert Jackson's case, *post*. Extreme cases of this kind do, no doubt, frequently arise; and the reason why they do not get into the books seems to be, either that grand juries will not indict, or that traverse juries, acting upon their prerogative of judging of the law as well as the facts, "take the bits in their teeth," as it is sometimes roughly termed, and, whatever the charge of the judge may be, acquit. It is, perhaps, fortunate, that juries are vested with this power in criminal cases; for otherwise, accused persons might frequently find the tenure of their lives or liberties determined according to technical rules or unyielding precedents, not sufficiently expansible to reach the merits of each particular case. In other words, the judge would frequently decide wrong, and give a good legal reason for so doing; while the jury would decide "according to the very right of the case," without being able to give any legal reason therefor. In this view, the right of juries to sit as judges of the law, as well as of the facts, may, perhaps, be said to belong to the *equity side* of our criminal jurisprudence.

But while the law must be sufficiently expansible to provide for such cases, it is not from these that are to be deduced those *general rules* that are to govern society. The law is satisfied with reaching the ordinary exigencies of life; and hence we find, that the general rules laid down by courts and text writers, do not appear to extend to such emergencies as those indicated.

JOHNSON v. THE STATE.

[27 TEXAS, 758.]

Supreme Court of Texas, Galveston, 1865.

ORAN M. ROBERTS, *Chief Justice.*
 GEORGE F. MOORE, } *Associate Justices.*
 REUBEN A. REEVES, }

HOMICIDE IN SELF-DEFENCE—COMMUNICATED THREATS.

1. When a party who has taken the life of another relies upon threats against his own life as an element in his defence, he must show that at the

time of the killing, some act was done by the deceased from which he, the accused, might reasonably infer an intention of immediately carrying such threats into effect; in which case the accused was justified in the use of such means as were in his power, for his own defence, and if death ensued thereby, the homicide was justifiable. [Acc. Lander's case, *ante*, p. 366; Rippy's case, *ante*, p. 345; Williams' case, *ante*, p. 349; Evans' case, *ante*, p. 329; Head's case, *ante*, p. 341. Contra, Phillips' case, *ante*, p. 383; Carico's case, *ante*, p. 389; Bohannon's case, *ante*, p. 395; Robert Jackson's case, *post*; Little's case, *post*.]

2. Nor is it the law that the mere fact of being encountered or overtaken in the street or public highway, by one who has threatened another's life some months before, without any act indicative of an intention of then carrying such threat into execution, is "an adequate cause" to excite such "anger, rage, sudden resentment or terror," as renders the mind "incapable of cool reflection," so as to reduce a killing to manslaughter, under Art. 596 of the Texas Penal Code. [Pasch. Dig. Tex. Stat., Art. 2251.]

3. But in no case can mere antecedent threats, not accompanied by some demonstration indicative of their immediate execution, either justify the homicide of the party who made them, or reduce it from murder to manslaughter; and there is nothing in the 596th article of the Penal Code to countenance a different conclusion. [See note to Sloan's case, *post*.]

4. The jury were instructed that they could "take into consideration all the facts and circumstances surrounding the parties at the time of the killing." *Held*, that this authorized the jury to consider of antecedent threats made by the deceased against the life of the accused, and which, it was also proved, had been communicated to the accused. [See Bohannon's case, *ante*, last case, where the same instruction was given.]

5. The affidavits of jurors are not admissible to impeach their verdict.

The appellant was indicted at the Spring Term, 1862, of the District Court of McLennan county, for the murder of Demetrius Hays. The offence was charged to have been committed on the 21st day of December, 1861. After various orders and continuances, the case came to trial at the Fall Term, 1864, when the defendant pleaded not guilty.

The defendant proved by two witnesses, whose testimony is substantially the same, that they and the accused stayed at the house of Mrs. Parsons in Waco, the night previous to the morning on which Hays was killed; that on that morning the defendant left Mrs. Parsons' for the purpose of going up town to attend to some business; that defendant carried his gun and took with him his negro boy, also armed with a gun, as had been the habit of defendant ever since the killing of his

brother, Houston Johnson; that defendant took the street he usually took, when he went up town, he and his boy being on horseback; that some five or ten minutes before defendant left Mrs. Parsons', the deceased and his nephew, James D. Hays, had started down the back way to the river. The witnesses were standing in the porch, and their attention was called by a negro girl remarking "there goes Hays after Dr. Johnson." They then saw Hays riding up in a walk from the river to the street, in the direction of the street that Johnson was in; that after Johnson had passed the street that Hays was in, and had passed the corner of the picketing and the house in the yard, Hays put his horse into a pace or trot, and rode up and turned the corner of the picketing into the street after Johnson. That after Hays had come into the street behind Johnson, the latter turned and shot, and Hays fell from his horse. One of the witnesses heard but the one shot; the other stated that Johnson fired a second time, after Hays had fallen from his horse.

By Thompson Newby, a witness for the defence, it was proved that Hays had made threats against Johnson; witness did not tell Johnson of the threats, but told Miller that Hays was carrying his gun for Johnson, and Johnson told witness to tell Hays to quit carrying his gun for him, or he would be compelled to hurt him. That Hays said he had waylaid Johnson and Beauchamp, and if they had come along that night he would have got them. Hays told witness this just after Johnson and Beauchamp had had a difficulty with Hays. That Hays made the worst of the threats on the evening or night after the difficulty, which was while the leaves were green and before corn was gathered, in the fall before Hays was killed. That Hays was in the habit of carrying his gun and six-shooter. On cross-examination, the witness stated that he never heard Hays threaten to attack and kill Johnson but once, and that was when he came home on the night that he said Johnson and Beauchamp had attacked him on his way from town.

That his head was bleeding and cut with a stick, and he said Johnson had broken his walking stick over his head, and that Beauchamp had shot at him ; that after he had come back from lying in wait that night, he said if they had come along he would have got them ; that Hays showed witness the place he lay in wait for them ; it was in the corner of his own field which witness was cultivating. That Hays' way of making threats was that if Johnson did so and so, he, Hays, would do so and so ; and in this way witness had often heard Hays threaten Johnson up to the time of his death.

C. B. Tuning, a witness for the defence, testified that he had heard Hays threaten Johnson ; that Hays came to witness' house and asked him if he had some large buckshot, saying that his shot were too small and he wanted some larger ones ; that he intended "to set them up, or fix them up," meaning Johnson and Beauchamp ; that this was a day or so after Johnson and Beauchamp had a difficulty with Hays. That witness told Johnson what Hays said about him, and about his wanting buckshot ; and also told him that he thought he was not safe, and he had better take some one with him when he went about.

Isam Farris, for the defence, testified that he heard Hays say that he and Johnson could not live in the same range and travel the same road.

There is other evidence in the record introduced by the defence, and relating to the previous killing of Houston Johnson, a brother of the defendant, by one Ensaw ; in which, it seems, Hays had been accused of participation.

With reference to the evidence of antecedent threats by Hays introduced by the defence, the Court charged the jury as follows :

"The defendant, Johnson, seeks to justify or excuse the killing of Hays on the ground of threats made by Hays to take the life of him, Johnson. Now, threats by Hays to kill Johnson, do not afford a justification for Johnson's killing Hays, unless it be shown by the evidence that at the time of the killing, Hays, by some

act then done, manifested an intention to kill Johnson.

“In ascertaining the guilt or innocence of the defendant, the jury have the right to take into consideration all the facts and circumstances surrounding the parties at the time of the killing, which were given in evidence before you. If the defendant, at the time of the killing, had a reasonable apprehension that it was the intention of Hays to make an immediate assault on him and take his life, or do him some great bodily harm, he had the right to defend himself, and it would make no difference whether the danger was real or imaginary, so that it had the appearance of being real. But, in order for Johnson to justify himself on this ground, you must believe from the evidence that the circumstances surrounding the parties were such as to create a just and reasonable apprehension, such as would convince the mind of a reasonable man beyond all reasonable doubt, that it was the intention of Hays to make an immediate assault on Johnson, and take his life or do him some great bodily harm; and if you so believe, you will, by your verdict, find the defendant not guilty. But Johnson had no right to kill Hays under the apprehension that Hays might kill him at some future time; and if that was the motive that induced Johnson to kill Hays, he was guilty of murder in so doing.”

The defendant, by his counsel, asked the Court to instruct the jury:

“1st. If the jury believe from the evidence that from all the circumstances in the case the defendant had reasonable grounds to believe, at the time of the killing, that it was necessary to kill Hays to save his own life, or from great bodily harm, then the killing was neither murder nor manslaughter, but self-defence.

“If the Court instructs as to threats under the statute, § 612, then the following instructions are asked:

“2d. Section 612 governs and is applicable only when the defendant seeks to justify under threats alone.

“3d. No statute can abridge, circumscribe or lessen the right of self-defence.”

The Court refused these instructions, and the defendant excepted.

The jury convicted the prisoner of murder in the second degree, and assessed his punishment at five years in the penitentiary, and judgment was given according.

Motion for new trial on all the usual grounds, and also because "the charges of the Court were given in such a way that the jury were misled in the case, and said instructions were contrary to law."

The motion being overruled, the defendant excepted, appealed, and assigned nine causes of error, nearly all of which are sufficiently indicated in the foregoing statement of facts, and in the opinion of the Court. The sixth assignment was as follows: "The Court erred in its main charge to the jury, in instructing them only as to the offence of murder in the first and second degree, and omitting to instruct them as to what circumstances would reduce the offence to manslaughter; thus forcing the jury to the conclusion, that if they found the defendant guilty of any offence, it could not be less than murder in the second degree."

F. W. Chandler, M. H. Bowers, and R. N. Goode, for the appellant; the *Attorney-General*, for the appellee.

MOORE, J., delivered the opinion of the Court:

* * * * *

A detailed statement of, or comment upon, the facts of this case, would be an unpleasant as well as unprofitable task on our part. It is sufficient for us to say that we are clearly of opinion that the Judge in the court below was correct in holding, if the deceased was killed by the accused, which was not controverted, that the case was, unquestionably, either murder or justifiable homicide. The law upon this subject, if it were not sufficiently so before, has been clearly and conclusively settled by the provisions of the Code,* so that "he who

* See the provisions of the Texas Code on justifiable homicide, *ante*, p. 181, note.

runs may read." And it is time that it should be looked to by every one as his rule of conduct, instead of his own passions, or a *pseudo* popular sentiment, that any one who has threatened another's life is an outlaw, or beyond the pale of legal protection, and may be slain with impunity by his enemy. If they do not, it is at least the imperative duty of those who do not make, but administer the law, to follow and enforce its plain and obvious commands. The circumstances under which a party, who takes the life of another, may rely upon "threats" as an element in his defence, is clearly shown by Art. 612 of the Penal Code.^b If, at the time of the homicide, there is any act from which the accused may reasonably infer an intention to carry them into effect, he is justified in resorting to such means as may be then in his power, to defend and protect himself against their execution. If death ensues, it is justifiable homicide. But in no case under the provisions of the Code, or out of it, if we were permitted to look elsewhere to ascertain the law upon the subject, can it be held that mere threats, or threats unaccompanied by some demonstration, from which the accused may reasonably infer the intention of their execution by the deceased, either justify such homicide, or reduce it from murder to manslaughter. A different view of the law has been sought to be maintained by a reference to the third clause of Art. 596 of the Penal Code, which is in the following language, viz: "The passion intended is either of the emotions of the mind known as anger, rage, sudden resentment or terror, rendering it incapable of cool reflection." This clause is introduced into the Code in connection with the preceding clauses of the same article, for the purpose of more clearly defining what was meant, in the definition of manslaughter, by the expression, "under the immediate influence of sudden passion," and it is preceded by the declaration, "that the provocation must arise at the time of the commission of the offence, and that the passion is not the result of a former provocation." Manslaughter

^bSee the article in question in the syllabus of Pridgen's case, *post*.

in itself is defined in the Code as "voluntary homicide committed under the influence of sudden passion arising from adequate cause, but neither justified or excused by law." The doctrine contended for, must, therefore, be narrowed down to this simple proposition, that the mere fact of being encountered or overtaken in the street, or public highway by one who has threatened another's life some months before, without any act whatever, indicative of an intention of then carrying such threat into execution, is "an adequate cause" to excite such "anger, rage, sudden resentment, or terror," as renders the mind "incapable of cool reflection." The bare statement of this proposition is sufficient for its refutation. If such was the case, the language of passion, forgotten with the occasion which gave it utterance, the idle tattle of the silly or the inebriate, must be paid for with the penalty of life. A full flood-gate would be given to the most wicked passions, and murder, fearful as it already is, in a tenfold greater degree would stalk through the land, clothed in the panoply of the law.

The seventh assignment of error is based upon the supposition that the charge of the Court withdrew from the consideration of the jury the previous threats of the deceased to take the appellant's life. We cannot, however, regard this as either a fair or legitimate construction of the charge of the Court. Its import is obviously directly to the contrary. The jury were informed that they had "the right to take into consideration all the facts and circumstances surrounding the parties at the time of the killing, which were given in evidence," etc. What facts and circumstances were the jury to understand, were here referred to? Can any sane mind suppose that the Court was thereby restricting the jury to the mere consideration of what transpired at and immediately preceding the homicide? No facts or circumstances had then occurred to which this part of the charge could have any appropriate reference. The appellant had attempted the development of none such as the basis of his defence. Full two-thirds of the time the

Court was engaged in the trial of the case, however, must have been consumed in developing and expounding the evidence touching the alleged threats, conspiracy, and lying in wait by the deceased to take the life of the accused, as the ground of his defence. Although these things were antecedent occurrences, is it meant to be said that they were not vital, living facts and circumstances surrounding the parties at time of the killing? How can any facts and circumstances be said to surround parties, save as they connect themselves with, and are explanatory of their conduct and intention in the particular matter drawn in question? Shall not all those, which are legitimately so connected, be properly said to surround the parties? If more than we have said were necessary to vindicate this part of the charge from the severe criticism that has been passed upon it, it will be amply found in what is said in the same connection in the subsequent part of the charge. For the portion of it against which this objection has been pressed with so much zeal, is but an isolated paragraph culled from the body of the charge. The fair and natural construction of the entire charge, and especially when taken in connection with the facts transpiring during the progress of trials, leave not the slightest ground for its misconception.

In connection with the objection to the charge, it is insisted that it was, in fact, misconstrued by the jury, and in proof thereof the affidavit of three of the jurymen was presented to the Court on the motion for the new trial. Aside from the fact that this is not recognized by the code as a ground for a new trial, we may say that no case has yet occurred in which such affidavits have been tolerated in the Courts of this State for the purpose of impeaching a verdict. And when we consider the wide door which would be thereby opened for improper practices, we would hesitate long, and feel ourselves constrained by imperative necessity for accomplishing the ends of justice, before we could give our sanction to such a practice. Although a few isolated cases may be

found in which such affidavits have been received, the better practice seems to have been established in most, if not all the States except Tennessee, to reject them. The question has been before this Court heretofore on more than one occasion, and it has been uniformly decided adversely to the appellant. See *Little v. Birdwell*, 21 Tex. R., 612; *Kilgore v. Jordan*, 17 Id., 341. We see nothing in the present case to invite us to a different line of decision. The affidavit of the jurors is not more clear than the instruction by which it is alleged they were misled; and if they failed to understand it, with all the light shed upon it by the transpiring events during the progress of the trial, it may be well questioned whether they fully understood the true import of the *ex parte* affidavit which was procured from them.

* * * * *

Judgment affirmed.

PRIDGEN v. THE STATE.

[31 TEXAS, 420.]

Supreme Court of Texas, Austin, October Term, 1868.

AMOS MORRILL, *Chief Justice*.*

LIVINGSTON LINDSAY,	} <i>Associate Justices.</i>
ALLEN H. LATIMER,	
COLBERT CALDWELL,	
ANDREW J. HAMILTON,	

HOMICIDE IN SELF-DEFENCE—COMMUNICATED THREATS.

1. Article 612 of the Texas Penal Code reads as follows: "Where a defendant accused of murder seeks to justify himself on the ground of threats against his own life, he may be permitted to introduce evidence of the threats made, but the same shall not be regarded as affording a justification for the offence, unless it be shown that at the time of the homicide,

*These judges held office by military appointment under the Reconstruction Act of Congress of July 19, 1867.

the person killed by some act then done, manifested an intention to execute the threat so made. In every instance where proof of threats has been made, it shall be competent to introduce evidence of the general character of the deceased. Such evidence shall extend only to an enquiry as to whether the deceased was a man of violent and of dangerous character, or a man of kind and inoffensive disposition, or whether he was such a person as might reasonably be expected to execute a threat made." Paschal's Dig., Art. 2270. Under this statute, it is the right of the accused to introduce evidence of threats made by the deceased against him, and communicated to him, without first establishing as a predicate to the introduction of such evidence, that at the time of the killing, the deceased was doing some act indicating an intention of carrying such threats into execution. LINDSAY, J., dissenting. [Acc. Robert Jackson's case, *post*. Contra, Myer's case, *post*; Hays' case, *post*.]

2. Whether such threats, taken in connection with the facts which existed at the time of the killing, are sufficient to justify the killing, is a question of fact for the jury; and the judge cannot determine this question as a question of law, by ruling that the facts immediately surrounding the killing do not afford a sufficient predicate for the introduction of evidence of the previous threats.

3. The whole object of proving threats is to ascertain the mind of the prisoner at the very moment of the commission of the homicide; every circumstance which tends to prove this, is important, because a murder is a matter of intent, and cannot exist without malice. [See Little's case, *post*; Scoggins' case, *post*; Sloan's case, *post*.]

4. Whenever threats of the deceased against the defendant are proved, evidence of the character of the deceased for violence is also, by the provisions of the statute, to be admitted

5. A denial of any legal right in a criminal case is sufficient to reverse the judgment; and to this class belongs the ruling above indicated. [Acc. Logue's case, *ante*, p. 269; Contra, Evans' case, *ante*, p. 329. And see note b. to Wells' case, *ante*, p. 151.]

Indictment for murder and conviction of murder in the second degree.

Several witnesses were present at the tragedy. Some were sworn for the prisoner and some for the State. Yet there was such near agreement as rarely occurs. The killing was at the store of Henry F. Spear, at the Missouri Valley post-office, in Victoria county, Texas, on the twelfth of October, 1867. The deceased, Cornelius Pridgen, and the witness, Daniel Weiseger, were sitting at the store-house door of Spear, when the accused, Pridgen, and Spear rode up and saluted them with usual politeness. Brown did not return the

salutation. Pridgen entered the store and sat down in a chair. Brown entered by another door and took a seat upon the counter. Both were armed with six-shooters. Brown asked Pridgen if he had found his horse. Pridgen said that he had not. Brown said, "He is in your brother's field." Pridgen then said, "I think it was unkind and ungenerous in you to employ the young man Thompson. He had previously been in my employment, and I was on his bail bond, and could at any time deliver him up." Brown replied that he supposed Thompson was a free man, and seemed to deny any knowledge of the suretyship. And here Brown complained that Pridgen had accused him with being concerned with Thompson in stealing the horse. This Pridgen denied, and demanded Brown's authority for the accusation. Brown pointed to the witness, Weiseger. Weiseger, being appealed to by Pridgen, stated what he had told Brown, and who was his author. Pridgen concluded the conversation by saying, "I do not care for you," at the same time rising from his chair. To which Brown instantly replied, "No, and nobody cares for you," as he descended from the counter. No other words were spoken, except the remark by Pridgen, "Do you draw your six-shooter?" or, "Don't draw your six-shooter." About the same moment Pridgen fired, and immediately followed it by another shot. Both shots took effect. Brown fell, and died almost immediately. His pistol was found girded on behind him. It had not been removed from the scabbard. One witness saw Brown during the dialogue put his hand behind him, as if to adjust his pistol; another witness thought the pistol impeded Brown's descent from the counter, though Pridgen did not fire until he had descended to his feet and taken one step forward. Pridgen had the advantage of having his pistol drawn when he first got upon his feet, or about the same time. Another witness swore positively that Brown made no attempt to draw his pistol, but had his hands at his side when he got upon his feet and until he was shot.

The whole dialogue was an angry conversation, (though one witness swore to Pridgen's coolness until he rose from his chair,) and when Pridgen said, "I don't care for you," or, "I don't care who said it," as others had it, he was much excited. There was evidence that when Brown descended from the counter he took one step forward.

Upon this state of the evidence, and at different periods, Pridgen offered evidence that Brown had the day previous and on two other days before, threatened his life, and that he was a dangerous man, likely to execute his threats. The Court excluded this evidence, on the ground that no sufficient basis for this proof had been laid. The Court added that he was the judge of the circumstances at the time of the killing, and, therefore, of the admissibility of the evidence. The Court charged three degrees of felonious homicide, much in the language of the statute. Paschal's Dig., Arts. 2251, 2252, 2266. And he refused all charges of excusable homicide in self-defence.

The jury found the defendant guilty of murder in the second degree and assessed his punishment at five years' imprisonment. The points were all saved by bills of exceptions, counter-instructions, and motions for a new trial. The defendant appealed.

James H. Bell, for appellant; *E. B. Turner*, Attorney-General, for the State.

CALDWELL, J.—This was an indictment for murder, in the District Court of Victoria county; trial at the spring term, 1868, and a conviction for murder in the second degree.

During the progress of the trial, there were several exceptions to the ruling of the Court, all embodied in a motion for a new trial, which was overruled, and the prisoner appealed.

Two errors are relied on for a reversal, all others having been abandoned by counsel for the prisoner in this Court.

1. The Court erred in its rulings, "in refusing to permit

the defendant to make proof of previous threats immediately preceding the shooting, which were communicated to the defendant."

2. The Court erred "in refusing to permit the defendant to introduce proof of the violent and dangerous character of the deceased, and that he was a man likely to carry his threats into execution."

The admissibility of "threats" as evidence in justification of homicide, has ever been a perplexing question, and it cannot be safely said that there is any fixed rule, assented to by jurists as a uniform one, alike applicable to all cases. Each is impressed with its peculiar surroundings, and must be judged of by them.

The Code of Criminal Procedure [Paschal's Dig., Art. 2270] provides that, "where a defendant accused of murder seeks to justify himself on the ground of threats against his own life, he may be permitted to introduce evidence of the threats made; but the same shall not be regarded as affording a justification for the offence, unless it be shown that at the time of homicide the person killed, by some act then done, manifested an intention to execute the threat so made. In every instance where proof of threats has been made, it shall be competent to introduce evidence of the general character of the deceased. Such evidence shall extend only to an enquiry as to whether the deceased was a man of violent or dangerous character, or a man of kind and inoffensive disposition, or whether he was such a person as might reasonably be expected to execute a threat made." This we do not regard as a new rule, but a statutory declaration of the old.

The judge who presided on the trial in the court below, seems to have acted upon the theory that before evidence of threats could be introduced, there must have been laid a predicate in the nature of proof disclosing some act at the time of the homicide, manifesting an intention to carry the supposed threats into execution, and that such acts were questions of law for the Court, and not of fact to be submitted to the jury. Thus viewing the law, it was

held that the circumstances surrounding the parties at the time of the killing did not furnish the required predicate.

It is an elementary rule, that if there be any evidence is a question for the Judge, but its sufficiency for the purpose relied on is for the jury to determine. 1 Greenl. on Ev., § 49. If we hold that the defendant must first prove that his antagonist manifested a hostile purpose by acts done at the time of the homicide, it would seem that antecedent threats of violence could be of no avail, because these acts of themselves would excuse, extenuate, or justify, according to their nature or grade. Thus the whole object of the law in acquainting the jury with previous threats would be defeated.

The sole object of introducing threats against a prisoner is to ascertain his frame of mind at the very moment of the commission of the homicide. It follows, then, that every circumstance, however light or trivial, that can furnish any *indicia* of this frame or condition of the mind becomes highly important, and is relevant to ascertain the intent with which the act was committed, because murder is essentially the creature of intent, and cannot exist without malice. A jury might with perfect propriety conclude that the acts of the deceased at the time of the killing were not sufficient to extenuate or justify, but, when these acts are coupled with the previous threats of violence, communicated to the defendant, they may present an entirely new phase; "trifles light as air" then become pregnant with meaning, and completely negative the idea of malice.

In Rector's case,* 19 Wend., 589, counsel for the prisoner offered evidence of the rioters breaking in the prisoner's house on the previous Saturday night, and that the rioters threatened to return on another night and break in unless admitted. This was offered to establish a reasonable ground for the prisoner's apprehending the execution of a similar threat now repeated. Judge COWEN held that the evidence ought to have been received, remarking

*Post.

that real alarm on the part of the prisoner on apparent, though unreal, grounds, was pertinent to the issue. The jury might have laid no stress upon the circumstance, but it should have been received, because we cannot say they would not. The lightness of a relevant circumstance is no argument for withholding it from the jury.

In Howell's case,^b 5 Georgia, 54, the distinct proposition is, whether it was competent for the defendant to prove threats by the deceased against the prisoner. Judge WARNER, in delivering the opinion of the Court, said: "Whether the evidence was sufficient to excite the fears of a reasonable man * * was a question for the jury. The evidence was competent to show the *quo animo* of the defendant. All we can say is, that the question propounded to the witness * * was a legal and competent question. What effect the answer would have had upon the jury, of course we cannot know. All we decide is, that on a trial for murder * * it is competent, under the provisions of our Code, for the defendant to ask a witness if he did not know that the deceased * * made any threats to drive the prisoner from the place or take his life;" and Rector's case is cited with approbation.

When it is borne in mind that in Howell's case, the deceased was approaching the prisoner without being aware of his proximity, the defendant discovered himself and fired the fatal shot, it will be seen that it is a much stronger case than the one at bar.

Lander's case,^c 12 Tex., 462, is relied on by the Attorney-General in support of the correctness of the ruling of the Court below. We think it rather in affirmance of the view we take. In that case, the evidence of threats by the deceased against the prisoner was admitted without objection. Nor did this Court on appeal intimate that it was improperly done. It will be observed that in this case, Lander, the threatened party, went about compassing the destruction of his enemy, waylaid and shot him, when he was wholly unconscious of his presence.

^b *Post*, note to Monroe's case. ^c *Ante*, p. 365.

There could be no pretence here of acts done by the deceased at the time of the homicide, and yet the threats were introduced. Lander acted upon the vulgar notion that he who threatens the life of another is an outlaw as to the person menaced, without the pale of the law, and may be circumvented and slain with impunity. The point made was as to the sufficiency of threats, unaccompanied by acts at the time of the killing, to excuse, extenuate, or justify, and it was rightly held that they were not sufficient.

Johnson's case,^a 27 Tex., 758, is to the same effect.

Threats were introduced without objection, but it was assigned as error, that the Court, in the charge, withdrew from the consideration of the jury the threats as an element of the prisoner's defence. In upholding the sufficiency of the charge and its freedom from the alleged objection, Judge MOORE said: "Full two-thirds of the time the Court was engaged in the trial of the cause, must have been consumed in developing and expounding the evidence touching the alleged threats * * as the ground of defence." Although "these things (the threats, among others) were antecedent occurrences, is it meant to be said that they were not vital living facts and circumstances surrounding the parties at the time of the killing? How can any facts and circumstances be said to surround parties, save as they connect themselves with, and are explanatory of, their conduct and intention in the particular matter drawn in question? Shall not all those which are legitimately so connected be properly said to surround the parties?" From this it is plain the Court was of the opinion that the threats were circumstances from which legitimate deductions might be drawn, and should be referred to the jury.

If, then, such an important element, in ascertaining the prisoner's frame of mind, and the intent with which he committed the act, as previous threats against his life are withheld from the jury, can it be seriously insisted on that he has had a trial under the law of the land?

^a *Ante*, last case.

It was insisted on in argument that this Court, upon inspection of the whole record, might affirm the judgment, if, in its opinion, there was sufficient evidence to sustain the verdict. This is not the law. The rule may be applicable in civil cases, but not in criminal prosecutions when life is involved. A denial of any legal right is sufficient to reverse the judgment. *Phipps v. The State*, 3 Coldw., 344.

It is the right of the prisoner to have every relevant circumstance from which a conclusion can be drawn consistent with innocence, daguerreotyped on the mind of the jury and reflected back in the shape of their verdict.

The effect of the ruling in the Court below was, that the circumstances surrounding the parties, developed on the trial, were not sufficient to extenuate or justify, notwithstanding the threats. This was a question of fact for the jury, to be responded to under a proper charge of the Court.

As the case must be again referred to a jury, we will only notice the facts to observe, that at the time of the homicide the parties confronted each other. The proof showed there was a present ability on the part of the deceased to execute the supposed threats; that there had been ill feeling between the parties; and an angry conversation, growing out of their differences, was going on at the time of the killing; that there were simultaneous movements by the parties, of such menacing nature, as to induce one of the witnesses to seek safety in avoiding the apprehended shots of both.

We think all these circumstances should have been interpreted by the jury through the mirror of the threatened attack. We do not say they ought to have had any weight with the jury. On this point we express no opinion at all. All we decide is, that a prisoner accused of murder may introduce evidence of threats against himself by the deceased, and whether there are any acts done at the time of the killing by the deceased which will extenuate or justify, is a question of fact for the

jury. It follows from this, that evidence also of the character of the deceased may be introduced, etc., as provided in the code. Paschal's Dig., Art. 2270.

It may be said that the policy of permitting the introduction of threats as evidence before a predicate is laid, will have the effect of enabling the criminal to screen himself from the consequences of his crime; that the Courts should scrutinize with jealous care every avenue by which the criminal might escape. To the former we reply, that Courts, as such, can have no policy of their own. To the latter, as men, we may lament the prevalence of crime, and moreover, the decadence of public virtue, evidenced by the reckless disregard of human life; but as jurists, we can only expound the law as it has been handed down to us by the fathers, and leave the consequences to God and the country.

The judgment of the Court below, in overruling the motion for a new trial, is reversed, and the cause remanded for another trial.

LINDSAY, J., dissenting.—I cannot concur in the conclusion, arrived at by my learned brothers, in the determination of this cause. In this case, an indictment was found by the grand jury of Victoria county, for murder, against appellant, Wiley W. Pridgen, upon which he was arraigned, tried, and found guilty by the petit jury, of murder in the second degree, and his punishment assessed to be confinement in the penitentiary of the State for a period of five years. The judgment of the Court was thereupon entered, from which the prisoner has appealed to the Court, and it is now here for revision.

The grounds upon which a reversal is sought, are, that the Court below erred in excluding from the jury, upon the trial, testimony offered to prove that the deceased had made threats against the life of the prisoner, which threats were communicated to him prior to the homicide, and that the deceased was a man who might reasonably be expected to execute a threat made.

It is insisted that the Court palpably erred in denying the admissibility of the testimony offered; that the Court had no right to pass a preliminary judgment upon the testimony offered, even to determine upon its relevancy, or to ascertain, if introduced, whether it would be sufficient in law to justify the homicide charged upon the prisoner. It is contended that article 2270, Paschal's Digest of the Criminal Code, has established a new rule of evidence in criminal trials, which completely divests the Judge of all discretion in the conduct of the trial in the admission, or exclusion of threats which have been brought to the knowledge of the accused previous to the commission of the homicide. We cannot think that such a scope was intended to be given to this enactment by the legislature. A latitude of interpretation so dangerous to social order, and, in its practical operation, so subversive of the safeguards to all personal security, should not be indulged, unless required by the most obvious and authoritative command of the law-giver. The article in the Criminal Code is in this language: "Where a defendant, accused of murder, seeks to justify himself on the ground of threats against his own life, he may be permitted to introduce evidence of the threats made, but the same shall not be regarded as affording a justification for the offence, unless it be shown that, at the time of the homicide, the person killed, by some act then done, manifested an intention to execute the threat so made."

Such is the language of our criminal code, which it is conceived has interpolated a new rule of evidence in the criminal jurisprudence of our State. In our view, it is not a change in the common-law rule of evidence in criminal cases, but a change of the nature and character of the homicide, committed upon a knowledge of previous threats, coupled with a demonstrative attempt to carry those threats into execution at the time of the killing. Instead of reducing such killing to manslaughter, as at the common law, it simply divests the killing of all malice, express or implied, and makes it justifiable

homicide, according to this provision in our criminal code; while at the common law, such killing would be manslaughter, and punishable accordingly.

At the common law, the accused was not debarred the privilege of proving previous threats of the deceased, when he had laid the foundation for their introduction, by showing that deceased, at the time of the killing, was making an effort to carry them into execution. And in such case, if the deceased was the aggressor in the conflict, it would be self-defence by the common law in the slayer, unless the proof developed that the accused had sought an occasion to bring on the collision. It is, then, no new rule of evidence. It is a change of the character of the homicide which this provision of the code gives to the effect of the evidence, making what was manslaughter at common law, justifiable homicide by the code. Both systems permit the introduction of previous threats: the one to rebut the presumption of malice implied in the killing; the other, enlarging the liberty, if not the right, of self-defence, makes an act justifiable which by the common law was a felony. This article in the code hath this extent, no more.

The peace and good order of society, the personal security of the citizen, the protection of life against the wanton violence of the desperate and the reckless, will be put in continual jeopardy, if the principle is once established by positive law, or by judicial determination, that the judges, who preside over the public trials in criminal matters have no discretion in controlling the admissibility of testimony. This is the peculiar province of the judge, and one of the highest and most cherished attributes of the judicial function in all trials by jury. The judge must determine the law of the case; the jury, upon both theory and principle, are the judges of the facts.

It is true, in the practical operation of our judicial system, that the juries, by their general verdicts, do actually decide both upon the law and the facts of a case; and in all acquittals, if they should decide erroneously,

the results are beyond the correction of the courts. It is for this reason, according to the philosophy of our judicial system, the power of control over the admissibility of testimony is properly confided to the Judge. His errors are subject to correction, by motion in arrest of judgment, for a new trial, or by appeal. The error of the jury upon a finding of "not guilty" is past all correction. In these determinations society has a deep interest, as well as the accused; and it is as equally important to its welfare that the guilty should be punished as that the innocent should be shielded and protected. Is it a principle of law, the suggestion of wisdom, the dictate of policy, or requirement of humanity, that a Court, while tenderly regardful of the rights and the interest of a prisoner, should be totally indifferent to social order and personal security? The judge is no less the guardian and protector of the public weal, than he is of the individual rights of the person who may be charged with a violation of the laws of the government.

The rule of action on this subject is clearly laid down by Justice STORY, in the case of the United States v. Bautista, 2 Sum., 343: "The jury should respond as to the facts, and the court as to the law." This is in perfect harmony with the common law, and with our own Criminal Code, which declares, in article 3058, Paschal's Digest, that "the jury are the exclusive judges of the facts in every criminal cause, but not of the law in any case." It will be observed, from an examination of the article under consideration, that the language of it is permissive, not imperative. It is, that the accused may be permitted to introduce proof of threats. Why not have used the language of command, if it was intended to deprive the court of all discretion, and give up the authority to the jury to decide the question of law, whether such threats were to be "regarded as affording a justification of the offence;" a pure and unmixed question of law, which, according to the code, must be judged of exclusively by the Court. The questions of fact for the jury to determine were, whether the threats

were made and communicated to the prisoner before the commission of the homicide, and whether at the time of the killing, the deceased manifested, by any act then done, an intention to execute the threats so made. These were the simple facts, of which the jury were to judge.

If either of these facts was wanting in the proof, whose province was it to determine the legal question whether a justification of the homicide was established, the Court or the jury? In legal contemplation both facts must concur to establish the justification. Is justification a conclusion of law, or a mere finding of facts by the jury? If it be a conclusion of law, then, by the code, the jury are the judges "of the law in no case." One of these facts being wanting in the proof embracing the threats proposed, and no promise or assurance being given by the party that this hiatus would be filled—that this link in the broken chain would be supplied in the further progress of the trial—the judge could not shirk the legal responsibility of declaring that there was no evidence conducing to establish a justification under the law, without proving false to duty and recreant to the interest of society. If this view of the law be not correct, it is needless to seek in political causes a reason for the alarming and disgraceful frequency of homicides in our community. It may readily be found as an inherent vice in our criminal law, or in its judicial administration. When, in fact, the *res gestæ* had already been made manifest to the Court, who was to determine the question of law, whether there was any evidence in the case which, in the language of the code, could be "regarded as affording a justification of the offence," the Court or the jury? Who was to judge, after a full detail of all the "acts done" at the time of the homicide, whether any act was then done which superinduced the legal necessity or the judicial propriety of permitting the accused to introduce previous threats, brought to his knowledge before the killing took place? It was the province of the Court so to judge, and the Court alone.

If there was no act then done manifesting an intention to execute the threats, the threats, however numerous and violent they might have been, were improper testimony for the jury, because in the philosophy of the law, they would serve only to bias and prejudice the minds of the jury, and thus defeat the pure administration of justice. There was no evidence of justification. The question of justification is a deduction of law from the facts. Threats alone cannot constitute it. There was, then, no evidence of justification, unless the deceased at the time of the homicide was manifesting, by a positive act then done, an intention to execute the threats. It is an unquestioned rule of law that the judge alone is to determine whether there be any evidence to establish a legal proposition or consequence. The jury, when there is evidence, are the sole judges of its sufficiency.

There was not a single witness who was present at the time of the homicide, and who testified on the trial, among the five who were present, who would venture to state that the deceased made any attempt, by any act then done, at violence upon the person of the accused. The immediate transaction was utterly barren of all such proof. If, upon the testimony given in this case of the "acts done" at the time of the homicide, they can be tortured into circumstances even conducing to prove that the deceased manifested an intention to carry previous threats into execution, then, in open, public homicides, the flash of the eye, the curl of the lip, the elevation of the nose, the passionate intonations of the voice, the crimsoned flush of the cheeks, the slightest deviation from the quiet repose of a statue, become legal synonyms of "acts done" at the time of the homicide, and every manslayer will find his perfect vindication and legal justification in the "acts done" by his unfortunate victim. Such an interpretation of our criminal law should not be given, unless its language be so plain and explicit as to leave no room for construction, because the mischiefs which will inevitably result in its practical operations upon society are beyond computation. In effect, it

stamps the signet of impunity upon every open, public homicide which may ever after be committed in the community.

The judge, in our opinion, violated no rule of evidence, in exercising his discretion, by excluding the testimony offered. The enquiry then recurs, did he, when all the facts constituting the *res gestæ* are taken into consideration, exercise that discretion soundly in rejecting the testimony offered to prove threats? This certainly depended upon the facts already proved, or pledged to be proved, in the subsequent progress of the trial, which might establish their materiality as a ground of justification. If the proposition be true, as we think the law clearly settles, that the judge has the right to exercise his judgment in determining upon the relevancy of testimony, in revising his judgment in this case, we, as judges of the law, are bound to make the extraordinary assumption, that the threats proposed to be proved, in conjunction with what had already been proved, of the immediate circumstances of the killing, were a justification in law, when, in fact, it might be that not a single member of the Court so believed. For, we are simply required to revise his judgment upon the law as to the conclusion, whether, if let in, the proof would be sufficient to establish the justification.

With the exercise of the discretion of inferior tribunals appellate courts are little inclined to interfere. And they rarely ever do interfere, unless manifest and palpable wrong has been committed. There is a philosophical reason why they do ordinarily refuse to interfere with the legal discretion of inferior tribunals. It is because such tribunals are in closer contiguity with the scenes and incidents of the transactions upon which they are called to pass judgment, and they are required to hear direct and immediate rehearsals of the whole drama, which gives them better opportunities of considering and weighing all the concomitant and adventitious circumstances, inseparable from all such trials, but which cannot be photographed and transferred to the record for the

revision of an appellate court. I cannot perceive that any manifest wrong has been done to the prisoner in this case. On the contrary, from the clear and explicit detail of the facts, occurring at the time of the tragedy, the prisoner received as favorable a verdict from the hands of the jury as he had any just right to expect.

Judgment reversed.

MYERS ET. AL. V. THE STATE.

[33 TEXAS, 525.]

Supreme Court of Texas, Tyler Term, 1870.

AMOS MORRILL, *Chief Justice.*

LIVINGSTON LINDSAY,
MOSES B. WALKER,
JAMES DENISON, } *Associate Judges.*

HOMICIDE IN SELF-DEFENCE—COMMUNICATED THREATS—EXPRESSIONS OF OPINION.

1. Though the Criminal Code of Texas [Pasch. Dig. Stat., Art. 2270] is explicit that a party accused of murder may justify the homicide by proof of threats against his own life by the party slain, coupled with some act of the latter at the time of the homicide, manifesting an intention to execute the threat made, yet the rule which controls the mode of introducing proof of such threats, is left by the Code to be settled by the principles of the common law. [See the statute in Pridgen's case, *ante*, last case and *quære*, as to the meaning of this dictum. See note, *sub fin.*]

2. The threat which will justify a homicide must be an actual threat by the slain party, to take the life of the slayer, and such threat must have been brought directly to the knowledge of the slayer; and moreover, it must be unequivocally shown that, at the time of the killing, the party slain was doing some act which demonstrated his intention to carry the threat into execution. And if such positive demonstration is made by the party slain at the time of the homicide, the accused is always entitled to the benefit of such testimony as will show all such threats of his victim, as were communicated before the killing. [See note, *sub fin.*]

3. Expressions of an opinion by the party slain that the accused was pursuing a line of conduct which would endanger or cost him his life,

cannot be considered threats against the life of the accused; and it was not error to exclude from the jury testimony offered by the accused to prove such expressions, and that they had been communicated to him. [See note, *sub fin.*],

The appellants, Robert C. Myers, David Myers and George W. Hardy, were jointly indicted for the murder of William H. Millican. They pleaded not guilty, and were jointly tried at the same term, the jury finding them guilty of murder in the second degree, and assessing their punishment at six years confinement at hard labor in the penitentiary.

The killing took place on the evening of Sunday, the sixth of February, 1870, in a "saloon" kept by Robert C. Myers in the town of Millican. Whatever evidence of antecedent ill will between the parties may be implied in the facts of the case, there had been no quarrelling nor previous conflict. The circumstances immediately attendant upon the killing, were thus stated by H. A. Long, the first witness for the State:

On the sixth of February, 1870, witness was living with R. C. Myers, and was acquainted with Millican, the deceased. About six o'clock, P. M., of that day, Millican came into Myers' saloon, saying "good evening, gentlemen." R. C. Myers, G. W. Hardy and David Myers were in the saloon, but they made no reply to Millican's salutation. Millican walked in and passed along the side of the counter, when R. C. Myers fired two shots in quick succession, one taking effect in the side of the deceased, the other in his back. The gun used by Myers was a double-barrel shot-gun. Witness was in the saloon when Millican entered it; he wore on that night a heavy black overcoat. The house was kept as a drinking saloon by R. C. Myers; witness had seen Millican come into it often, and sometimes as late as nine o'clock at night. Drinking water was kept at or near the end of the counter, towards which Millican was walking when shot by Myers. Deceased frequently came into the saloon and got a drink of water. After the second shot, witness ran out and reported that Millican was shot, and got one

Martin to return with him to the saloon. When they got there, defendants were all gone, and Millican was lying on his face on the floor, dead. Martin raised the deceased's overcoat to see how he was shot, and found a six-shooter lying on the floor under him. The deceased did not have on any pistol belt or scabbard. When Millican came into the saloon, Allen Myers was following close after him, and before R. C. Myers shot, he called to Allen to get out of the way, and when Millican was shot he cried out "murder." Witness had been in the saloon about fifteen minutes before Millican came in.

On cross-examination, the witness stated that Millican had his overcoat buttoned up around his neck and face. The gun used by Myers had been standing for weeks in the place from which Myers took it. On re-examination, he stated that he did not see Myers pick up the gun; only supposed he picked it up after Millican entered the saloon.

This testimony shows substantially what occurred at the time of the killing. The controverted questions, however, arise out of other and antecedent circumstances.

T. C. Woodlief, a witness for the State, on examination in chief, testified that about four o'clock in the afternoon of the day on which the killing took place, R. C. Myers went to witness' house in Millican, under great agitation and excitement, and entered one of the rooms and commenced loading a gun. On cross-examination, the defence asked the witness what was said by Myers at that time explanatory of his excitement and purpose, but the State objected, and the Court sustained the objection, and the witness was not permitted to state the declarations made by Myers, to which the defendants duly excepted.

The defendants introduced Leander Cannon, who testified that about noon on the day of the killing, the deceased applied to witness for the loan of a pistol, and witness told him his pistol was at home. In the conversation which ensued, the deceased said to witness that old Robert Myers was taking a good deal of dish in fer-

reting out the hanging of that negro, and he would have to kill him to get him out of the way. This testimony was objected to by the State, on the ground that these statements of the deceased were not shown to have been communicated to Myers or any one else by the witness, before the homicide. The objection was sustained, the evidence ruled out, and the defendants excepted.

W. L. Abbott, for the defendants, says, about four o'clock in the evening of the homicide, he informed R. C. Myers, that there was a plot to assassinate him, Myers ; that he, the witness, expected on coming to town that morning to have found him murdered ; that Myers asked him what he should do to avoid assassination, and witness told him to keep in the dark and away from the windows, and to send feelers ahead of him in passing between his residence and his grocery. Defendants also proposed to prove by this witness that great consternation and excitement were produced in Myers' mind by this information and advice of the witness. But on objection of the State, this testimony of Abbott was excluded, and the defendants excepted. This same witness, however, was allowed to testify that about three or four o'clock in the afternoon of the day of the killing, he found R. C. Myers and Hardy together ; that he, witness, called Myers to one side and told him he had a secret to communicate to him, and informed him that on the day previous, Millican had told witness that Myers was trying to get the military to come to the town of Millican, to investigate the hanging of that negro, and he, Millican, would not be in Myers' boots for \$100,000 ; that he would be shot all to pieces, or they would shoot him all to pieces, and that his old hide would not hold shucks. The witness further stated that Myers appeared to be greatly excited by the communication.

H. P. Edwards, witness for defendants, testified that he had a conversation with Millican on the day before the killing, in which Millican told witness he had better be careful how he talked before R. C. Myers, because Myers was trying to ferret out the hanging of that negro.

and he would not be in Myers' shoes for \$10,000; and witness told this to Myers in the back room of his saloon. But further statements of this witness, to the effect that he advised Myers that his life was in danger, etc., were excluded on objection of the State; and the defendants excepted.

The defendants further proposed examining Leander Cannon to prove that while Millican kept the keys and had charge of the prison house in the town of Millican, a freedman was taken out of the prison house and hung; that Millican was implicated and engaged in the hanging; and that R. C. Myers was on the inquest upon the body of the negro, and condemned the act as murder, saying that the people should hold an indignation meeting. The State objected to such testimony, and it was excluded, the defendants again excepting to the ruling.

These several rulings of the Court below, excluding proposed testimony for the defence, are those to which reference is made in the opinions delivered in this case.

As an important fact in the case, however, it is proper to state that, by one Smith, the defendants proved that Millican, the deceased, borrowed a six-shooter from the witness about sundown on the day of the killing, and the witness identified the pistol found under Millican's body as the same loaned him by witness. When Millican borrowed it, he asked witness if it was sure fire, and witness told him it was.

Allen Myers, for the defence, testified that Millican walked into the saloon hurriedly; that he had a six-shooter in his right hand, holding it by his right side and rather behind him. This witness further stated, that when Millican entered the saloon, "he broke for behind the counter." Witness walked in close behind Millican, and saw R. C. Myers take up his gun, and heard him call out to witness to get out of the way, and then R. C. Myers fired on Millican, shooting off both barrels of his gun, one after the other.

Enough has been stated to disclose the important features of the case. The evidence implicating David

Myers and G. W. Hardy consisted of assistance rendered by them to R. C. Myers, in the way of procuring and preparing arms, etc., shortly before the killing.

The charge to the jury presented the case as one either of justifiable homicide on the one hand, or of murder in the first or second degree on the other.

Davis & Beall, and Hancock & West, for the appellants; *E. B. Turner*, Attorney-General, for the State.

LINDSAY, J., delivered the opinion of the Court:

The language of the Criminal Code is very explicit, that when a party is accused of murder, he may justify the homicide by proof of threats made against his own life by the slain party. The rule which controls the mode of its introduction, however, is still left by the code to be settled by the principles of the common law. They must be actual threats to take the life of the accused, and those threats must be brought directly to his knowledge.

If the justification is attempted upon the ground of such threats having been previously communicated to the slayer, it must be unequivocally shown that the party slain was doing some act at the time of the killing, which manifested an intention to carry the threat into execution. It is necessary at that moment there should be some positive demonstration of the fell purpose, to warrant the exercise of this extreme right of sacrificing the life of a human being. If such positive demonstration is made by the party slain, at the time of the homicide, the accused is entitled always to the benefit of such testimony, as will show all such threats of his victim, which were communicated to him before the killing.

The communication made by the witness, Abbott, to the slayer, Myers, was no threat of the deceased Millican to do personal violence to the accused by himself. It was nothing but an opinion expressed by him of the probable consequences which might result from the line of conduct he was pursuing; and, instead of indicating a purpose to assassinate him, was expressive of some

solicitude about the peril in which he was placing himself in that community. The language of the communication of this witness cannot be tortured into a threat of personal violence intended by the decedent.

All the false hue and false coloring of a threat of personal violence by the deceased, the transaction borrows as the reflected light of the alleged actual threat set forth in the bill of exceptions, as the intended statement of Cannon as a witness, but which never was communicated to the slayer. The statement of the witness, Edwards, to the accused, had no more the complexion of a threat of personal violence of the deceased upon the slayer, than did the testimony of the witness, Abbott.

These were the only witnesses who made any communications to the accused; and these communications were not threats, but the mere expressions of an opinion of the peril in which the accused, R. C. Myers, was placing himself in an excited community. Without the testimony set forth in the several bills of exceptions, these two witnesses who made the communication did not interpret them as threats of violence by the decedent.

There being, therefore, no threat by the decedent to take the life of the accused, which was communicated to him, his action at the time of the homicide could not have been founded upon any reasonable expectation that deceased was about to carry threats upon his life into execution.

The law, therefore, implies malice in the killing, and the verdict of the jury, whose province it was to judge, and who seemed to have judged reasonably about the facts, only respond to the just demands of the law. The excluded testimony presented in the bills of exceptions was properly excluded by the Court; facts they might be, but they were inadmissible by the rules of law, and would not have shown any legal justification for the homicide.

The judgment of the District Court is affirmed, and the new trial refused.

DENISON, J., concurred fully in the above, but dissented on another ground.

Judgment affirmed.

NOTE.—The dicta in the first and second paragraphs of the opinion in this case, that the rule which controls the mode of introducing evidence of previous threats, is left by the code to be settled by the principles of the common law; and that, “*if such positive demonstration is made by the party slain at the time of the homicide*, the accused is entitled always to the benefit of such testimony as will show all such threats of his victim, which were communicated to him before the killing,” would seem to indicate that the judge who delivered the opinion in this case, had in his mind the views expressed by him in his dissenting opinion in Pridgen’s case, *ante*, last case. But as the question decided in that case, did not arise here, the language above quoted cannot be otherwise regarded than as *obiter dicta*, and this case cannot be quoted as overruling Pridgen’s case.

Apart from this question, and viewing this case upon the merits as disclosed in the reporter’s statement, it seems to be one of those unfortunate cases, where not only the plain rules of law, but the very right and justice of the case have been violated; and what is worse, violated against that presumption which the law humanely indulges in favor of the innocence of every man who is put upon trial for crime.

In Pridgen’s case, *supra*, the plain and just rule was laid down that “it is the right of the prisoner to have every relevant circumstance, from which a conclusion can be drawn consistent with innocence, daguerreotyped on the mind of the jury, and reflected back in the shape of their verdict;” and that “every circumstance, however light or trivial, that can furnish any *indicia* of the defendant’s frame or condition of mind becomes highly important, and is relevant to ascertain the intent with which the act was committed, because murder is essentially the creature of intent, and cannot exist without malice.” This rule has been declared in numerous instances. Thus, we find in Keener’s case, *post*, the following language: “It is stated by Mr. Starkie, *Treatise on Evidence*, p. 39, Mr. Roscoe, *Ev.* pp. 74 *et seq.*, and all other writers on evidence, that the general rule is, that *all* circumstances of a transaction may be submitted to the jury, provided they afford any fair presumption or inference as to the matter in issue. This proposition is exceedingly broad; and *if carried out in good faith, would produce the most beneficial results*. Accordingly, in *Richardson v. Royalton and Woodstock Turnpike Co.*, 6 Vt., 496, and *Davis v. Calvert*, 5 Gill & Johnson, 269, it was held that all facts upon which any reasonable presumption or inference can be founded, as to the truth or falsity of the issue, are admissible in evidence. The Court also examine and cite *Coldwell v. State*, 17 Conn., and *Goodrich’s case*, [*post*], in support of the rule; and *in view of the frequent failure of justice from the failure of evidence, and being thoroughly convinced that no competent means of ascertaining the truth ought to be neglected*, hold it error to exclude from the jury, testimony of threats not communicated to the prisoner.” And in another case the same court say “This court stands pledged by its past history, for the abolition, to the extent of its power, of all *exclusionary* rules, which shut

out facts from the jury, which may serve directly or remotely, to reflect light upon the transaction upon which they are called upon to pass." *Haynes v. The State*, 17 Ga., 484. See also *Goodrich's case*, *post*; *State v. Nelson*, 2 Swan, Tenn., 262; *Little's case*, *post*.

But instead of keeping in view the plain and just principles declared in these cases, the circuit judge in the principal case seems to have labored studiously in his rulings to suppress every fact which could tend to exhibit the previous attitude of the parties towards each other, and thus explain the motives which prompted the accused to do the killing. For instance, it would be difficult to perceive under what rule of evidence or of common justice the State was permitted to prove that, two hours before the killing, the defendant entered the witness' house, under great agitation and excitement, and commenced loading a gun, while the Court refused to permit the accused to prove, by cross-examining the same witness, what he said explanatory of his excitement and purpose—as though his declarations made at the time were not as much a part of the *res gestæ* as the act itself—as though they were not eminently calculated to characterize the act and determine its quality. 1 Greenl. Ev., § 108; *Monroe's case*, *post*; *Goodrich's case*, *post*; *Collin's case*, in note to *Scoggins' case*, *post*.

The testimony of Abbott and of Myers, which was excluded, had a direct tendency to show that the defendant had been put in extreme fear of assassination at the hands of the deceased, and in so far, tended to negative the presumption of malice, arising from the fact of the killing, and to show that the defendant acted under apprehensions of death or great bodily harm. This, unless the fears were *reasonable*, would not, it is true, *excuse* the homicide; but the killing of another under such an impulse would, at most, be manslaughter. *Keener's case*, *post*; *Grainger's case*, *ante*, p. 238; *Pasch. Dig. Tex.*, Statutes, Art. 596.

Again, the testimony of Cannon, which was excluded, had a tendency to prove that the deceased had been implicated in the lynching of a negro, and that the accused had sat upon the inquest, and had denounced the act as murder; and this, when taken in connection with the testimony of Abbott and Edwards, which was excluded, and also that of the same witnesses which was admitted, had a direct tendency to show that the defendant had reason to be in extreme fear of assassination at the hands of the deceased. For the declarations of the deceased, which had been communicated to the defendant, that he, defendant, was trying to ferret out the hanging of the negro, and to bring the military to the town to investigate it; that he, deceased, would not be in defendant's boots for one hundred thousand dollars; that defendant would be shot all to pieces, so that his old hide would not hold shucks,—could have had no other effect; and how the revising Court could construe such expressions into a solicitude for the peril in which the defendant was placing himself in the community, is more than we can see. On the contrary, it seems to us, that these expressions, taken in connection with the testimony which was ruled out, assume the character of covert threats, of the most dark and malignant character, and calculated to excite much more fear, on account of their very vagueness, than open threats of death or other violence. These declarations, in connection with the array of suppressed testimony, and viewed also in connection with the facts testified to by Smith and Allen Myers, namely, that the deceased borrowed a

pistol for the occasion, asking if it was sure fire ; advanced into the saloon where the defendant was, holding it in his right hand and a little behind him ; and that after he was killed, the same pistol was found under his body, would make it probable that the defendant did the killing through fear of immediate death, and that he had reasonable grounds for such apprehension. At all events, it should have been left for the jury to determine, with all the testimony before them which could cast light on the transaction. whether this were so or not.

In whatever light we view this case, then, we are unable to see any grounds on which it can be supported.

Another Texas case, where the ruling of the circuit judge was equally inexplicable, received very different treatment at the hands of the Supreme Court of that State. We refer to Underwood's case, decided in 1860, and reported in 25 Texas Supplement, 389. In that case, Routh, a witness for the State, had met the accused in the morning at the spring, near the house of the witness. The accused rode on the road leading to Pilot Point, in Denton county. Witness rode to his house, and, while unsaddling his horse, the deceased, Thomas Spain, rode up and enquired for Underwood. Learning that he was on the road to Pilot Point, he invited the witness to ride with him. They came within three hundred yards of Underwood, after riding about four miles ; Underwood left the road ; Spain drew his pistol and gave chase ; Routh, the witness, pursued also, but was soon left three hundred yards behind by the fleet horse of Spain. Spain overtook Underwood. Spain's pistol seemed to have missed fire. Underwood fired and killed Spain, and continued his flight, still whipping his horse with a lariat. Several witnesses proved material parts of these facts. Sundry instructions were asked on both sides, and the Court gave a long charge. The jury returned a verdict of guilty of murder in the second degree, and assessed the punishment at twenty years' imprisonment in the penitentiary. Judgment was rendered, but no sentence was passed, because of the appeal by the accused.

BELL, J., delivered the opinion of the Supreme Court, as follows : " We deem it unnecessary in this case to notice either the instructions given by the Court to the jury, or those asked by the counsel for the appellant, and refused by the Court. The evidence is not sufficient to sustain the verdict of the jury, and the motion for a new trial ought to have been maintained by the Court below. The case is not one of a conflict of evidence, but it is one in which the evidence is not sufficient to establish the guilt of the party accused.

"The judgment of the Court below is therefore reversed, and the cause remanded for another trial."

It seems to us that this case and the principal case, placed side by side, illustrate in a strong light, the hazard to which the lives of innocent men may be subjected under the best system of laws, administered by fallible agents. But for the interposition of a court of errors in the last case, the defendant would have suffered twenty years' imprisonment for performing an act of the most necessary self-defence ; and in the first, the defendants are debarred the privilege of a fair trial, and compelled to suffer, perhaps unjustly, notwithstanding the interposition of such a court.

MONROE v. THE STATE.

[5 GA., 85.]

Supreme Court of Georgia, Americus, July Term, 1848.

JOSEPH HENRY LUMPKIN,	} <i>Judges.</i>
HIRAM WARNER,	
EUGENIUS A. NISBET,	

**HOMICIDE IN SELF-DEFENCE—DECLARATIONS—THREATS—CHARACTER OF
DECEASED—EVIDENCE OF PREVIOUS RELATIONS OF THE PARTIES
TOWARDS EACH OTHER.**

1. When an act is done to which it is necessary to ascribe a motive, it is always considered that what is said at the time, from which the motive may be collected, is a part of the *res gestæ*. [See the last case, and note.]

2. In general, what a party says is not evidence in his favor, unless it be a part of a conversation of which some other part has already been given in the testimony. But where the declarations of a party accompany an act, and are a part of the transaction, evidence of them is admissible.

3. It is a good rule, though in many cases difficult of application, that to be a part of the *res gestæ*, the declarations must have been made at the time of the act done, which they are supposed to characterize, and must be well calculated to unfold the nature and quality of the facts they were intended to explain, and so harmonize with them as obviously to constitute one transaction. [See the last case, where this rule was violated.]

4. The declarations of a defendant, antecedent to the fact, are sometimes admitted, as tending to explain and reconcile his conduct, and to exhibit the *quo animo* with which the act was committed. [See Myers' case, *ante*, last case, and note.]

5. Naked threats, unaccompanied with personal violence, made by the deceased against the defendant, are admissible to show the reasonableness of the defendant's fears, provided a knowledge of the threats is brought home to him. [Citing Howell's case, *sub. fin.*]

6. So, in this case, it is held competent to prove a continued series of threats accompanied by acts of violence by the deceased toward the prisoner, commencing some months previously, and coming down to the time of the killing, all showing a determination on the part of the deceased to take the life of the defendant before the next ensuing term of court; and which threats and conduct were known to the defendant. [Acc. Robert Jackson's case, *post*; Pridgen's case, *ante*, p. 416; Sloan's case, *post*; Scoggins' case, *post*; Rector's case, *post*; Meade's case, *post*.]

7. As a general rule, the slayer can derive no advantage from the character of the deceased for violence, provided the killing took place under circumstances which showed that he did not believe himself in danger. Yet, in cases of doubt, whether the homicide was perpetrated in malice, or from a principle of self-preservation, it is proper to admit any testimony calculated to illustrate to the jury the motive by which the prisoner was actuated. In such cases, the character of the deceased for violence has much to do with the reasonableness or unreasonableness of the defendant's fears. [Acc. Robertson's case, *ante*, p. 154; Cotton's case, *ante*, p. 310; Rippy's case, *ante*, p. 345; Little's case, *post*; and see Wesley's case, *ante*, p. 319; and Tackett's case, *post*, and those following it.]

8. The doctrine stated, that if an assailant intend to commit a trespass merely, to kill him is *manslaughter*; but if he design to perpetrate a felony, the killing is *self-defence*, and justifiable. [To kill a mere trespasser against property is murder. Harrison's case, *ante*, p. 71, and citations. To kill a mere trespasser against the person is murder or manslaughter according to the circumstances of the case. Thompson's case, *ante*, p. 92; Hill's case, *ante*, p. 199; Stewart's case, *ante*, p. 191.]

9. As a general rule, it is expedient to receive all evidence, in a trial for murder, which goes to show the state of feeling of the prisoner and deceased towards each other at the time of the killing; such as law suits, existing between the parties. [Citing *State v. Zellers, sub. fin.* Acc. Keener's case, *post*; Pridgen's case, *ante*, p. 416; *State v. Nelson*, 2 Swan, 262; *Haynes v. The State*, 17 Ga., 484. Contra, Myers' case, *ante*, last case.]

10. This principle applies with great force in a case like the present, where the prisoner had acted as prosecutor against the deceased in certain indictments; and from the time the same were returned until the time of the killing, the deceased kept up a continual series of threats and hostile demonstrations against the prisoner. Hence, in this case, it was held error to refuse to allow the defendant to prove, that as a justice of the Inferior Court of the county in which he and deceased resided, and at the request and by the appointment of his associates, he became the prosecutor of the deceased for embezzling the poor-school fund of said county; and that in consequence thereof, the deceased vowed that the defendant should not be at the trial of said indictment, for he would kill him.

This was an indictment for murder against Edward V. Monroe, for the killing of James A. H. Macon. Verdict, guilty; motion for new trial overruled, and writ of error.

The evidence in the case showed that the prisoner and deceased lived in the same town. The prisoner was a physician. The deceased entertained a feeling of violent hatred toward the prisoner, arising, as it seemed, from the fact that the prisoner had acted as prosecutor against him in certain cases for embezzling the poor-school fund.

On the day of the killing, and about eight o'clock in the morning, the deceased, armed with a "Yauger" rifle, which he sometimes, though not usually, carried, walked back and forth past the prisoner's office, and from several positions, watched the prisoner's office, apparently in a great rage, and was seen to point the gun in the direction of the office. These movements were observed by the prisoner, who remained in his office until about eleven o'clock. About this time, George Monroe, brother of the prisoner, brought a double-barreled shot-gun down town, and carried it to prisoner's office. Immediately after this, an interview took place between the deceased and George Monroe, at which, according to the testimony of George Monroe, the following conversation took place: Witness remarked, "I am sorry to see you so hostile to brother Edward." Deceased said, "I do not know what right any one has to say I am hostile to your brother." Witness replied that his brother Edward said that he, Macon, was carrying that gun for him, and had been trying that morning to shoot him. Macon replied that the prisoner must have come to that conclusion from the fact that he, Macon, had taken his gun out of his office. Macon said he had a right to carry his gun, and was in the habit of carrying it to kill birds and other things with it, and that no one could prevent him. Macon then asked George what he had taken the gun to his brother's office for. The latter replied, to enable his brother to defend himself in case of an attack from him, Macon. Macon then gritted his teeth and said fiercely that he would fight the prisoner any way but a fist and skull fight; that he would give the prisoner one of his pistols, taking the smaller one from his pocket, and offering it to the witness; that he would meet the prisoner with the other; that witness might tell him to come out with his double-barrel gun; he would allow him a fair chance, and "devil take the hindmost." Witness then told Macon that his brother would not injure him, except in self-defence. Macon then spoke of Tilman having a double-barreled gun in his store for prisoner to shoot

him with. Witness replied, if it was a fact, it was under an apprehension of an attack from him, Macon. The gun was for the defence of the prisoner. Macon replied, "if Dr. Monroe comes out of that office with that gun, I intend to pop him—I will pop him right between the eyes." Witness admonished deceased not to do it, as it would hang him and disgrace his family, and to put up his gun. Macon replied, that was his business. Witness then asked the cause of his animosity against the prisoner. He replied, "don't you know he is my prosecutor in all these cases against me?" Witness replied that he did not know it. Deceased then told the witness to tell his brother he was a liar, a rascal and a coward. Deceased also said, that he could send prisoner to the penitentiary. Witness advised him to do so, and not seek satisfaction in any other way. Deceased said no, he did not believe the law should have anything to do with such difficulties as that; he, Macon, did not settle his difficulties in that way; and refused to reveal his intentions toward the prisoner, and went on to tell in how many cases he had befriended the prisoner, and mentioned the case of the prisoner and Dr. Steel. That he had regarded the prisoner as his best friend, and had nothing that he would deny him. Said that prisoner must have consented to become his prosecutor, and repeated his charges of cowardice. During this conversation, Macon kept his eye fixed on prisoner's office, pointing and gritting his teeth.

Another witness testified as to this conversation between George Monroe and the deceased. Deceased asked George Monroe what he had brought up that gun for? George stated that he had brought it up for the prisoner; that he understood deceased had his gun for him, prisoner, and that he, prisoner, wanted his gun to defend himself. Deceased observed that he, deceased, was not after the prisoner; that he did not bring his gun up for that purpose, but that if Dr. Monroe wanted to play at that game, he was with him. That he, George, could say to his brother, if he would take his gun back,

he would not interrupt him; but if he came out with that gun, he, deceased, would take him between the eyes.

About one o'clock the prisoner was in Tilman's store. After being there about twenty minutes, he saw deceased approaching with his "Yauger;" stepped out of the door behind some boxes, cocking one barrel; stepped back into the store; cocked the other barrel; called out to Macon, "If you want to shoot, shoot," and then fired one barrel, killing him instantly. After Macon fell, it was found that his "Yauger" was cocked and the triggers sprung. He had two pistols on his person, one of which was loaded with ball.

1. During the examination of Willis A. Hawkins, one of the witnesses for the defence, the counsel for prisoner proposed to prove by said witness, the declarations of prisoner while in the office in the morning with his gun, going to show that prisoner was alarmed and apprised of the intention of deceased to attack him; particularly to prove the declaration of prisoner at that time, as follows, to-wit: "Yonder comes Macon now with his Yauger; he intends to shoot or kill me."

2. Defendant's counsel also offered to prove by said Hawkins, that when deceased was in the Court-house at the window,* defendant said to witness, "don't you see Macon at the window trying to shoot me?"

3. Defendant's counsel also proposed to ask said Hawkins why he left the office where he and prisoner were on that morning, with the view of bringing home the knowledge to the prisoner of the conduct of deceased on that occasion, his violence, anger, threats, etc.

4. Defendant's counsel proposed to prove by said Hawkins, that defendant told him, Hawkins, that he, prisoner, had seen the conduct of deceased, (as described by witness in his testimony, as taken down by the Court,) after it occurred in the morning, and before the shooting took place.

* One of the positions from which, on the morning of the killing, the deceased watched the prisoner's office.

5. That deceased had been seen to make an attack with deadly weapons, within six months, upon prisoner, and that prisoner fled at that time so hastily as to leave his cloak, until he, prisoner, had got beyond the reach of the arms of deceased.

6. A continued series of threats, commencing at the time of the returning of the true bill, at the fall term of the Superior Court of Lee county in 1847, followed up by repeated acts of violence, up to the time of the killing, by the said deceased against the prisoner, expressing a determination on the part of the deceased to take the life of prisoner, before the spring term of said Court, in 1848.

7. That deceased was a rash, violent, bloody-minded man, in the habit of taking secretly, the advantage of his adversaries in personal contests, and not willing to give his adversaries a fair and equal chance, and that prisoner was well acquainted with his character as such.

8. That on the morning of the day upon which the killing took place, after the violent conduct of deceased on that morning, and before the killing, defendant consulted with one Smith as a peace officer, as to the propriety of binding deceased over to keep the peace, and said Smith advised prisoner not to do so, as it would only enrage deceased, and make him more violent, and would do no good, as deceased could give the bond, and it would not restrain him from violence.

9. Defendant's counsel offered to introduce an order of the Inferior Court of Lee county appointing prisoner prosecutor of deceased for embezzling the poor-school fund of said county; and also the bill of indictment against said deceased for embezzlement of said fund, prisoner being prosecutor.

10. Defendant's counsel also offered to prove that the prisoner was one of the Inferior Court of said county.

11. Defendant's counsel also proposed to prove threats and acts of violence of deceased towards prisoner, at various times between the adjournment of the fall term

of the Superior Court of Lee county, 1847, and the killing of deceased.

All of the foregoing offers the presiding judge refused; to which rulings the prisoner's counsel, in each case, duly excepted.

Defendant's counsel were also prepared to prove by Samuel C. Wyche, William Bodiford, Elija Warren, Clifford Monroe, J. P. Cocke, and others, that at the time the bill of indictment against the deceased, for embezzlement, at the previous fall term, was read, the deceased was heard to declare that the prosecutor of said bill, the prisoner, should not live till the next term of said court, and be at court to prosecute the same, and that threats of this and the like character, accompanied with acts demonstrative of a fixed determination to carry them into execution, were made by defendant up to the day of the killing. That the acts were such as prowling around the residence of the prisoner with fire-arms, walking by the house with pistols and gun, and watching intently the while, as if for an opportunity to carry his threats into execution. That defendant, alarmed at such demonstrations, had kept close to avoid exposure, and often visited his patients by night stealthily, rather than expose himself by day to the danger of a rencounter with deceased. That these demonstrations had become so frequent and notorious that it had become the universal opinion of the neighborhood and citizens that deceased would kill the defendant. But all of which evidence, by the stringent rule adopted by the presiding judge in rejecting the testimony already offered, as to the threats and violence of the deceased, was excluded; and to which defendant's counsel believed they had a right to except.

Each of the foregoing rulings was duly assigned as error.

Warren, Colquitt & Wellborn, Bartow & Williams, S. T. Bailey, Dudley & Crawford, Lyon & Clark, Hawkins, Strozier, Sullivan & Moore, for plaintiff in error; *Perkins*, Solicitor-General, for the State.

Argument in brief of *Francis S. Bartow*, of counsel for plaintiff in error.

The prisoner was charged with murder. It was not denied that he had taken the life of James Macon. The presumption of law was of the sternest nature. It was incumbent on the prisoner to show his innocence. It was for him to prove whatever might mitigate, excuse or defend his act; it was for the jury to consider, carefully and anxiously, whatever he could offer in his behalf. Upon reason, then, he should have been allowed a full hearing of every circumstance which could have influenced his conduct. Justice would weigh with unwavering hand each atom thrown into her scales. The Common Law and the Statute Law alike affirm this doctrine. The Court below ruled, in effect that it would hear no evidence, except that which could exhibit the conduct of the parties at the time of the killing. The Court, in thus ruling, applied to this case the 15th section of the 4th division of the Penal Code: "That if a person kill another in his defence, it must appear that the danger was so great and urgent, at the *time of the killing*, that, in order to save his own life, the killing was absolutely necessary; and it must appear also, that the person killed was the assailant, and that the slayer had really and in good faith endeavored to decline any further struggle before the mortal blow was given."

The Court erred in the application of this principle. Even under that section there is room for the prisoner's evidence. But there is another principle of the law of homicide which is distinct, and must not be confounded with the one just quoted.

The Penal Code of Georgia *has made no change* in the common law of homicide, except by abolishing the *shade of guilt*, which the common law has fixed on "excusable homicide." In this it has only declared that "excusable homicide" at common law, shall be "justifiable" by the statute. But the Penal Code expressly affirms in words, the distinction which has always existed between these two species of homicide as applied to the *law of self-defence*.

There are two species of justifiable homicide, and Sir Michael Foster draws the distinction with great clearness. See Foster's Crown Law, 273. Our code has borrowed its language from his treatise. "Justifiable homicide," says section 12, "is the killing, etc., 1st, in self-defence, or, 2d, in defence of *habitation, property or person*, against one who manifestly *intends or endeavors*, by *violence or surprise* to commit a *felony* on either." And the next section declares, that "a bare fear of these offences shall not be sufficient to justify the killing. It must appear that the *circumstances* were sufficient to excite the *fears of a reasonable man*, and that the party killing really acted under the influence of those fears, and not in the spirit of revenge." This is what Mr. Foster calls justifiable self-defence. The 15th section which is quoted above, has manifestly no reference to that class of homicide. It refers to self-defence in a case of mutual combat, or what at common law was termed excusable homicide, or as Mr. Foster calls it, "excusable self-defence." And to that species of homicide he applies the language of the 15th section. There was capital error in confounding these two and distinct rules of law. There was error in applying, before hearing the evidence offered, the law of the 15th section, when the prisoner demanded a different and larger justification, under the law of the 12th and 13th sections of the Code. He claimed the principle of the statute and the common law, which authorized him "to repel force with force;" "to pursue his adversary;" not to *retreat* from him; to kill the enemy who intended and endeavored to commit a felony upon him; to act upon the *excitement* of his *reasonable fears*, and not to wait for the accomplishment of a wicked attempt. This was a right derived from nature; a right above and beyond human laws. Grotius, Book 1, c. 2, 53; Book 2, c. 1, 189. This is the principle affirmed by Lord HOLT, in Mawgridge's case. "He that hath shown that he has the malice against another, is not fit to be trusted with a dangerous weapon in his hand." See also Guiscard's case, Foster, 274.

He claimed that he had a right to show, by evidence, that there was no *malice* in his conduct. That he had acted from necessity in the maintenance of his personal and natural rights, or that, at least, the circumstances attending the transaction had reasonably excited his fears. He had assumed the responsibility of deciding those questions for himself. The propriety of that decision was now the matter for the jury to try. Whether they would, or would not, affirm his act, was the fearful issue. To do him justice, they must stand just where he did; they must feel as he felt; they must know all that he knew; they must see all that he had seen; they must hear all that he had heard. That he had a right to make such a defence is unquestionable.

In Selfridge's case, 160, Judge PARKER lays down this rule: "Where from the nature of the attack there is reasonable ground to believe that there is a design to destroy life, or to commit a felony upon his person, the killing of the assailant will be excusable homicide, although it should afterwards appear that no felony was intended." *

To the same point is Levett's case, 1 Hale, 42. In *Rex v. Scully*, 1 Car. & Pay., 319, the Court say: "The life of the prisoner was threatened, *and if he considered* his life in danger, he was justified in shooting the deceased."

The case of the People v. Anderson, 2 Wheeler, C. C., 407, is to the same point.

There were, then two subjects of enquiry:

1st, The acts and intent of the deceased.

2d, The acts and intent of the accused.

The evidence excluded on the trial, was offered to illustrate both these material subjects. Was that evidence proper and relevant? The object of judicial investigation is the ascertainment of truth. Evidence is the means by which that is effected, and its rules are the same in civil and criminal cases. It is variously adjusted to perform its task in the most certain and direct way. Some

* *Ante*, p. 18.

things are self-evident, some are proved by the senses. But there are other subjects which address themselves to no palpable standard of truth, but to human experience of human motive, feeling and passion, and of the sources of hope and fear.

We look at all the influences which have surrounded our fellow, and then we sound his heart by the plummet we have applied to our own. We "judge not according to appearances." We trace the cause from the effect, and consider whether there is any necessary connection between the act and the alleged motive of it. And when we have heard all and gone through with the anatomy of the heart, we who feel the influence of all motives which prompt to action, and all passions that stir the breast, know how to judge our fellow. Hence, the inestimable value of trial by jury. But what a mockery it becomes when the issue of life or death is tried, without evidence and without deliberation. The evidence offered and excluded, would have proved that the deceased and Monroe were in a state of war; war, waged by a criminal against him who would bring him to justice; conducted with malice and perseverance in a secret as well as open way; war, declared to the death against an unoffending man, who, so far from retaliating, made every effort to escape his adversary, until at last, threatened, goaded, pursued, hunted, until endurance was exhausted, he turned upon his adversary in the moment of hot pursuit, and did that which nature prompted him to do, and used that sword which the law herself placed in his hands and commanded him to use. This evidence, then, was indispensable to show the acts and intent of the deceased. Other evidence was offered to show the acts and intent of Monroe. His apprehension, his alarm, his knowledge of the intention of his adversary to take his life; that he had heard the threats, had escaped from the attempts to injure him; that he had been warned of his violent and vindictive nature, and had lived for weeks in a constant state of watchfulness, anxiety and alarm. In short, the evidence offered sought to

delineate the whole story from its inception to its termination; to paint each shade, and bring to light every object in the scene; to present it all for examination and for judgment. Surely, this evidence was pertinent; nay, that it went to the very marrow of the case. Yet it was rejected. No principle of law, and no decisions of courts, can be invoked in aid of this exclusion. We refer to the following authorities in support of our position. *Reynolds v. State*, 1 Kelly, 236; *State v. Zellers*,^b 2 Halstead, 220, 230, 237. In that case, the Chief Justice says: "The question is, what excited the prisoner to the commission of the act? Everything which operated upon his mind ought to be proved." And see 3 *Stewart v. Porter*,^c 308, 315. I quote from that case, one sentence: "If the circumstances of the killing were such as to leave any doubt whether he had not been more actuated by the principle of self-preservation than that of malice, it would be proper to admit any testimony calculated to illustrate to the jury the motives by which he had been actuated. See also *State v. Wright* 9 Yerger, 342. For the general principles governing this kind of evidence, see 1 *Starkie Ev.*, 56 *et seq.* And as to the acts and declarations of the prisoner prior to the killing, see 1 *Starkie Ev.*, 61, 66.

As to the effect of this testimony. That we are not obliged to show, though it is an easy task. The jury are the best, as they are the legal judges of the testimony. • Where there has been an improper rejection of testimony for the defence, or admission of testimony for the prosecution, a new trial will be ordered, though the Court be satisfied that the verdict was correct. *Peck v. State*, 2 *Humph.*, 78; *Wharton's Am. Crim. Law*, 639.

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Brief of the argument of *S. T. Bailey* for plaintiff in error.

In discussing the questions raised by the bill of exceptions, in behalf of the unfortunate, and I must say, much wronged plaintiff in error, I shall confine myself chiefly to two grounds of error, viz., rejection of evidence

^b Note, *sub fin.* • *Post*, note c. to Keener's case.

by the Court below, and his charge to the jury. In view of the case made by this record, may I not ask, and may not every freeman with alarm enquire, do we live under a system of laws whose soul is despotism and not justice, or do we live where just laws are badly administered? Who but the strongest would trust the law, as expounded in this record? Have we no chart to go by? Have the canons of the fathers of the law become obsolete? or, have the expounders of the law become wiser than the law itself? Every citizen, when he is arraigned for the criminal violation of the law, has a right to point the Court to, and require the Court to regard the following fundamental principles, standing at the head of the code by which he is to be tried, viz.:

Prince 620.^d “A crime or misdemeanor shall consist in a violation of a public law, in the commission of which there shall be an *union* or *joint* operation of *act and intention*; or criminal negligence.” “Intention will be manifested by the *circumstances connected with the perpetration* of the offence, and the sound mind and discretion of the person accused.”

Prince, 622. “Murder is the unlawful killing of a human being in the peace of the State, by a person of sound memory and discretion, with malice aforethought, either express or implied.”

“Express malice is that *deliberate intention* unlawfully to take away the life of a fellow creature, which is manifested by *external circumstances capable of proof*.”

“Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.”

Prince, 623. “A bare fear of any of those offences, to prevent which the homicide is alleged to have been committed, shall not be sufficient to justify the killing; it must appear that the *circumstances* were sufficient to excite the fears of a reasonable man, and that the party killing really *acted under the influence of those fears*, and not in the spirit of revenge.”

^d Prince's edition Georgia statutes, anno, 1837.

All these great safeguards were wholly overlooked, or disregarded in the trial of my unfortunate client. According to the rulings in that trial, "Joint operation of act and intention," were divorced. In that trial, it was not permitted to "show the manifest intention by the *circumstances* connected with the perpetration of the offence and the discretion of the accused." In that trial it was not permitted to show "by external circumstances capable of proof," that the "deliberate intention unlawfully to take away the life of a fellow being," was wanting, and that, therefore, there could be no malice. In that trial it was not permitted to show "any considerable provocation," and that the killing was not the work of "an abandoned and malignant heart." In that trial it was not suffered the prisoner to show that "*the circumstances were sufficient to excite the fears of a reasonable man, and that the party killing really acted under the influence of those fears, and not in a spirit of revenge.*"

The sole and only question before the Court below to try, was the intention to murder—the *malicious intention* to take life—and yet, strange to tell, the elucidation of that question was prohibited by the Court. The Court says to the victim, the killing is proven, and thereby malice is *prima facie* proven; the *onus* is on you to show by proof the absence of malice, and you shall not be permitted to introduce such proof. It is no answer—it is worse, it is mockery—to reply, you may show all that took place at the killing. It is not one time in ten that enough transpires at the killing to manifest absence of malice; and yet the act of killing throws the *onus* on the slayer. No man may with safety defend himself, his family or estate, unless he has by him a witness to prove the first assault. The outlawed desperado may prowl for the life of the innocent and honest; he may lay his plans and his snares for the life of his victim, in the face of day, and in the face of society, and yet, if his intended victim is seen to kill the assassin within his very domicile, or if he confesses

that he slew him in self-defence, nothing but the killing is legal proof. The assassin's bad character ; his threats and murderous plans ; and the good character of the prisoner go for nothing ; and the Court cruelly proceeds to perpetrate what the hand of God had not permitted the assassin to accomplish.

Mr. Starkie, in his most learned and philosophical work on evidence, remarks, "The law constantly notices the universal principle of evidence, that a man shall be taken to intend that which he does, or which is the immediate and natural consequence of his acts. In many cases, therefore, the allegation of intention, though essential to sustain the charge or claim, requires no other proof than that of the fact itself, the intention being the result or inference which the law draws from the act itself in the absence of a legal *justification or excuse*." In the absence of any principle or rule of law, by virtue of which either a conclusive inference, or any presumption as to intention ought to be drawn, from the act or its circumstances, the specific intention of the agent is a matter of fact, on which the jury are to exercise their discretion, on the *evidence before them*, as in ordinary cases, civil as well as criminal. Thus, on a charge of homicide, it may be for the jury to say whether the act was done with a malicious intent to destroy another, or merely to alarm and terrify him, or resulted from mere unavoidable accident, independent of any intention to injure another, or even of carelessness or negligence ; and according to that determination, the offence may amount to murder, or merely to manslaughter, or chance medley. In order, however, to arrive at a just conclusion upon such questions, the jury ought to act upon those presumptions which are recognized by the law as far as they are applicable, and *their own judgment and experience, as applied to all the circumstances and evidence*."

When the particular intention is essential, evidence of former attempts with that intention, is admissible to prove the intent. It is a general rule that whenever the

fact of intention is to be established by collateral evidence, it may be rebutted by contrary evidence." Starkie Ev., 417, 6th Am. Edition.

In the King v. Woodfall, 5 Burr., 2661, Lord MANSFIELD says, "That where an act in itself indifferent, if done with a particular intent becomes criminal, then the intent must be proved and found; but where the act is in itself unlawful, the proof of justification or excuse lies on the defendant, and, on failure thereof, the law implies a criminal intent."

In these short paragraphs from our code from Starkie and Burrows, the rules of law that ought to have governed the Court below, are briefly but clearly laid down. By them, he ought not to have mistaken his duty in the admission of evidence to try the only issue before him; viz, whether the malicious intent were present. How and by what better evidence than that repelled by the Court below, could such intent be disproved?

Griffin Smith was offered to prove that deceased, within six months, attacked prisoner with deadly weapons, and that he escaped by flight. It was also proposed to prove by Smith, by Wyche, by Bedford, by Warren, by Monroe, and by Cook, that at the fall term, 1847, of Lee court, prisoner, by the direction of the Inferior Court, one of whom he was, had acted as prosecutor on a bill found by the Grand Jury against the deceased, for embezzling the county funds, and that deceased then declared that prisoner should not live to be at the trial of that bill; that he would kill him, and that he continued such threats up to the time of the killing, together with violent acts and menacing conduct, such as lurking about the premises of prisoner, in a stealthy manner, armed; and that by such threatening conduct and violence, he compelled prisoner to abandon his practice in the day time, and to ride to visit his patients secretly in the night. By Hawkins, Smith, and others, it was proposed to prove that these threats and threatening conduct of deceased were known to the prisoner, and that he, by his speech and conduct, manifested great alarm and ap-

prehension of deceased. It was also proposed to prove by Smith and others, that prisoner applied to a magistrate to bind deceased to keep the peace towards him, and that he was advised not to do it, as it would aggravate and make him worse. It was also proposed to prove that deceased was a violent, bloody-minded man, disposed to take secret advantage of an adversary; all of which was repelled by the Court, most manifestly against law, as we strongly believe. The clear and explicit directions of our statute, requiring a union of act and intention to be proved to convict of crime, and then that malice shall be judged of by the jury from all the circumstances connected with the killing, and that reasonable fear shall repel the conclusion of malice, and excuse the act, would seem to leave "the wayfaring man, though a fool," no room to doubt the duty of the Court in such a case. But without such clear and explicit direction, with the rules of the common law before them as to the proof of malicious intent, no court in England or America, of any repute, ever committed such errors as those committed by the Court below. I ask the indulgence of this Court, while I refer to some cases and authorities to prove this.

Mr. Starkie says: "The legal distinctions which range themselves under the head of provocation, seem to depend principally, if not entirely, upon the question whether, in the absence of previous malice, the act of the defendant, under all the circumstances of the case, can be attributed to the general *infirmity and weakness of our nature*, or on the contrary, the facts themselves evince a wicked and vindictive disposition, and malignant spirit, fatally bent on mischief; for, as Sir Michael Foster observes, "it is to human frailty, and that alone, that the law indulgeth in every case of felonious homicide." 2 Starkie Ev., 523.

It is laid down in Bacon, "If a man, though in no great danger of serious bodily harm, *through fear, alarm or cowardice*, kill another, under the impression that great bodily injury is about to be inflicted upon him, it

is neither manslaughter nor murder, but self-defence." 7 Bacon Ab., 211.^o The same principle is said to have been decided in *Grainger v. the State*,¹ 5 Yerger, 459.

"A man may kill in defence of his person, habitation, property, etc., one who manifestly intends to commit a felony upon either, and he need not retreat: *this must appear from the circumstances.*" 1 Russell on Crimes, 549. Previous conduct may be looked into to show grounds of suspicion. *Ibid.*

Lord TENTERDEN, in his charge to the jury, in *The King v. Lynch*, said, "You will also take into consideration the previous habits and connection of the deceased and the prisoner, with respect to each other." 24 Com. L. R., Con., 341. [5 Car. & Pay., 324.]

In *The King v. Scully*, GARROW, Bar., said, "But here the life of the prisoner was threatened, and if *he considered his life in actual danger*, he was justified in shooting the deceased as he had done, but if, *not considering* his own life in danger, he rashly shot this man who was only a trespasser, he would be guilty of manslaughter." 11 Com. L. R. Con., 406. [1 Car. & Pay., 319.]

In the *Queen v. Smith*, 34 Com. L. R. Con., 335, [*Ante*, p. 130,] the Court allowed evidence of previous threats and violent conduct of deceased.

So, in the *Queen v. Fisher*, *Ib.*, 345, [8 Car. & Pay., 182,] the previous aggravating conduct of the deceased toward the son of the prisoner, was gone into.

So much for the law and the practice in England, where the officers of the crown were never accused of improper indulgence toward a delinquent subject.

Let us now look for a moment to the practice in America.

In *The State v. Patrick Blake*, PLATT, Judge, says: "This, as an *isolated fact, remote in point of time* from

We have been unable to find such a passage in Bacon's Abridgment. That work should not be cited by page, but by its titles and sub-titles.—
Eds. ' *Ante*, p. 238.

the transaction forming the charge the prisoner is called on to answer, is inadmissible. So, a former quarrel, *unconnected* with the transaction wherein the death ensued, cannot be given in evidence. But if you can *fill up the chasm* of time between that wherein the first and second wound was inflicted, showing that the latter flowed from the former *occasion*, or was *connected therewith*, or if you can show there were frequent quarrels between the prisoner and the deceased, taking place but a short time preceding her death, you are at liberty to produce such evidence." 1 City Hall Recorder, 100.

In the case of Christian Smith, tried before Judge VAN NESS, the witness, Lake, testified that he had a conversation with the prisoner; that the prisoner complained that the deceased had trespassed upon him continually; he further stated that prisoner and deceased had been at variance a number of years, and that the dispute extended to their respective families. 2 City Hall Rec., 78. Jacobson, another witness, testified that violent quarrels subsisted between prisoner and deceased, and frequent lawsuits were instituted; that the prisoner seemed disposed to live in peace, but the deceased refused to conciliate, or listen to terms of conciliation, declaring that he would give the prisoner law, or words to that effect. During life, deceased was a bad man, and his wife a turbulent woman with whom he could not live in peace. 2 City Hall Rec., 77, 81.

In the State v. Zellers, when evidence of the provoking and harrassing conduct of the deceased long previous to the killing was objected to, Chief Justice KIRKPATRICK said, "No man can defend his property, other than his dwelling house, from a trespasser, by making use of a deadly weapon; but inasmuch as the distinction between murder and manslaughter depends upon the *impulse* of the mind with which the act was committed, *every circumstance which goes to show the feelings of the parties towards each other, may be proven*. That temper which at one time might not be excited, might, under the excitement of *other circumstances*, be more easily roused,

and, *therefore, it may be received by the jury to show the state of mind of the parties.* 2 Halst., 230.

Again, the Chief Justice remarks, "The question is, what excited the prisoner to the commission of the act? *Everything that could operate upon his mind may be proved.* But you cannot give in evidence, conversations or acts of the deceased which never came to the knowledge of Zellers, for they could have no influence upon his mind, and could neither justify nor extenuate the crime." *Ibid*, 237.^a

In the State v. Drew, the Court went into evidence of the acts of the deceased some weeks prior to the killing. 4 Mass. R., 392.^b

If reported cases upon questions of this kind are not numerous, it is owing to the fact that the courts and the bar are generally too learned and too regardful of the lives, the feelings and the reputation of their fellow citizens, to commit such cruel errors as are manifest in this record.

LUMPKIN, J., delivered the opinion of the Court:

[After stating at full length the testimony, the rulings excepted to, and the errors assigned thereon, he said:]

And the first complaint is, the rejection by the presiding judge, of the whole of the testimony, which went to establish, by the prisoner's own acts and declarations, his knowledge of the threats and violent conduct of the deceased, and of his constant alarm and apprehension by reason thereof, of death or some great bodily hurt, at the hands of Macon.

This is a nice question, and one which requires to be treated with delicacy and discrimination. If we unconditionally refuse to allow a defendant, under any circumstances, to have his conduct interpreted by his acts and speech, we shall frequently deliver over the accused, a helpless and hopeless sufferer, to the penalty of the law. If, on the other hand, we permit him to manufacture tes-

^a See Zellers' case in note, *sub fin.* ^b *Post*.

timony for himself, the most mischievous consequences would often ensue. For how easy it is to feign fears which are not felt, and shape our course in such a way that premeditated revenge, while it gluts itself in the blood of its hapless victim, will refer to the past, as proof, not merely of innocence, but of the harassing alarm, from the bondage of which the accused had long groaned to be delivered.

When an act is done to which it is necessary to ascribe a motive, it is always considered that what is said at the time, from whence the motive may be collected, is a part of the *res gestæ*. As, where the question is under the Bankrupt Act, whether a trader ordered himself to be denied when at home, or left his house in order to delay creditors, what he said at the time of the act done, must necessarily be admitted to explain it, though not what he said at another time. Rep. Temp. Hard., 267; 5 T. R., 512. So, in an action by husband and wife for wounding the wife, Lord Ch. J. HOLT allowed what the wife said immediately upon the hurt received, and before she had time to devise anything for her own advantage, to be given in evidence as a part of the *res gestæ*. Skin., 402. And LAWRENCE, J., in *Aveson v. Lord Kinnaird*, 6 East, 188, said that "it is every day's experience in actions of assault, that what a man has said himself to his surgeon, is evidence to show what he suffered by reason of the assault." Lord ELLENBOROUGH, Ch. J., in the same case, stated that he should admit in evidence, in an action against the adulterer, the declaration of the wife, upon her elopement, that she fled from immediate terror of personal violence from the husband; though not if it were a collateral declaration of some matter which happened at another time. And the whole Court unanimously held in the case in East, that in an action by the husband upon a policy of insurance on the life of his wife, declarations of the wife, made while lying on her bed, apparently ill, stating the bad state of her health, at the period of her going to Manchester, (whither she went a few days before, in order to be examined by a surgeon,

to get a certificate of him of good health, preparatory to making the insurance,) down to that time, and her apprehension that she could not live ten days longer, by which time the policy had to be returned, are admissible in evidence to show her own opinion, who best knew the fact of the state of her health at the time of effecting the policy, which was on a day intervening between the time of her going to Manchester and the day on which said declarations were made. In *Rex v. Elisha Smythe and three others*, which was an indictment for a forcible entry, counsel for Goddard, one of the defendants, wished to ask the witness whether, at the time the house was searched, Goddard having a warrant in his hand, did not state for whom he searched. *Archbold*, for the prosecution, objected that what Goddard said could not be evidence in his own favor. But Lord TENTERDEN, Ch. J., overruled the objection, and decided that he would hear what the defendant, Goddard, said at the time, as to who he was searching for. 5 Car. & Pay., 201. In *Rex v. Crutchley*, *Ib.*, 133, on an indictment on the 7th & 8th, Geo. IV., ch. 30, § 4, for breaking a threshing machine, the Court allowed William Davis, a witness, to be asked whether the mob by whom the machine was broken, did not compel persons to go with them, and then compel each person to give one blow to the machine, and also whether at the time the prisoner and himself were forced to join the mob, they did not agree together to run away from the mob the first opportunity. In general, what a party says is not evidence in his favor, unless it be a part of a conversation of which some other part has already been given by the opposite party. But where the declarations of a party accompany the act, and are a part of the transaction, it is admissible. These declarations are often extremely material in cases of mutiny on board ships, as it often happens that when the mutineers have deposed the captain, they find that none of them are able to navigate the ship, and they then force one of the officers to assume the command of her; and he is in many cases brought to trial, because he

appeared to be acting with and directing the mutineers.

In *The State of Maryland v. Charles Ridgley*, 2 Harr. & McH., 130, an indictment for murder, the Court determined that the declarations of the prisoner antecedent to the fact, were admissible, as tending to explain and reconcile his conduct, and to discover the *quo animo* with which the homicide was committed. I would remark, as it respects this case, which is so directly in point, that it seems from the meagre report of it, occupying a half page only, that for aught that appears, it was decided without argument and without authority.

HOSMER, Ch. J., in *Enos v. Tuttle*, 3 Conn., 250, thus laid down the rule: That to be a part of the *res gestæ*, the declarations must have been made at the time of the act done, which they are supposed to characterize, and well calculated to unfold the nature and quality of the facts they were intended to explain, and so harmonize with them as obviously to constitute one transaction. And we apprehend, the rule as thus stated, approaches as near to accuracy as is consistent with the nature of the subject. The difficulty will be found in its application. We will endeavor, however, to test the evidence offered and refused by this principle.

And upon this point, I am free to acknowledge that I feel some embarrassment. The first inclination of my mind was to reject the whole of the testimony of Hawkins and Smith, as to the acts and declarations of the prisoner. And I still think that the safer course will be to exclude much of this proof. The difficulty consists in sifting and separating that which is legal from that which is illegal. The exclamation of Monroe to Hawkins, in the office of the latter, on the morning of the day when the killing took place, "*Yonder comes Macon with his Yauger,*" is free from valid objection; but what follows, "*he intends to kill me,*" is clearly inadmissible: The transaction as testified to, at the window of the court-house, and the conversation between the witness and the prisoner relative thereto, is of doubtful competency. Were I presiding in a capital case, I should

dislike to reject it. Defendant's counsel proposed to ask the witness why he left the office, where he and the prisoner were in the morning, with a view of bringing home to the knowledge of the prisoner, the conduct of the deceased on this occasion,—his violence, anger, threats, etc., which evidence was disallowed. No sufficient reason occurs to us for repelling this proof. We cannot anticipate what it would have disclosed. There is nothing exceptionable in the question propounded. For aught that appears, the answer might have brought home to the prisoner, knowledge of the conduct of the deceased and of his threats, wholly independent of his own sayings. We hold, too, that the statement of prisoner to witness before the shooting took place, that he saw the conduct of the deceased on the morning of the day, as it was described by Hawkins, should have been let in. For whether he saw it or not, and even conceding that this declaration was false, still, it establishes the fact conclusively, and a most material fact it is too, that the prisoner was apprised beforehand, from hearsay or observation, of the hostile purpose of the deceased.

As to the testimony of Smith in reference to the peace warrant, had the witness gone further, and swore that defendant actually applied for a warrant, and that upon his advice it was abandoned, I should be strongly disposed to hear the evidence. But it stops one step short of this. It only proposes to show that the prisoner *consulted* with witness touching the propriety of resorting to the proceeding. We think it useless to examine into this branch of the case more minutely.

It is contended that the Court erred in refusing to allow the introduction of testimony, to prove a continued series of threats accompanied by acts of violence from the deceased towards the prisoner, commencing some months previously, and coming down to the time of the killing, and all showing a determination on the part of the deceased to take the life of the defendant before the next ensuing term of the Lee Superior Court; and which threats and conduct were known to the defendant. My

remarks will be short on this point, having already decided at this term, in the case of *John D. Howell v. The State*,¹ that naked threats unaccompanied with personal violence were admissible to show the reasonableness of the defendant's fears, provided a knowledge of the threats was brought home to him. This doctrine may be inferred from what fell from the Court in *Hudgins v. The State*,¹ 2 Kelly, 173.

On the trial of Meade and Belt^k for the murder of Law, 1 Lewin C. C., 184, the Court allowed evidence to be given of the threats of the boatmen, the day previous, that they would come at night and pull his house down. And HOLROYD, J., in charging the jury, said: "If you are of the opinion that the prisoners were really attacked, and that Law and his party were on the point of breaking, or likely to do so, and *to execute the threats of the day before*, they were justified, perhaps, in firing as they did."

In the *People v. Rector*,¹ 19 Wend., 567, one of the questions raised by the prisoner's counsel was that the Court should have received proof of the violent breaking of the prisoner's house, on the previous Saturday night; that the inmates had been badly abused, and *that the rioters threatened to return another night, soon after, and break in if they were not admitted*; and this was offered to establish a reasonable ground for the prisoner's apprehending of a similar threat, now repeated and attempted. The Court say: "They do not understand it to be objected that real alarm on the part of the prisoner, on apparent, though unreal grounds, was not *pertinent* to the issue;" and Meade's case, already referred to, was cited with approbation.

In Patrick Blake's case, 1 and 2 City Hall Recorder, 99, the Court held that the prosecutor had the right to show repeated quarrels between the prisoner and the deceased, to establish the *malo animo*; but that he could not go back to a remote period, and show a particular quarrel, unless he followed it up with proof of a continued difference, flowing from such quarrel.

¹See note, *sub. fin.* ¹See note, *sub. fin.* ^kPost. ¹Post.

Such, precisely, was the object of the evidence which was repelled. What, I ask, really excited the prisoner to the commission of this act? He seems, throughout, be wholly free from the dominion of passion. Did he really and *bona fide* believe that deceased was coming towards him with intent to kill or do him some great personal injury? Did not all the circumstances justify this apprehension? In the opinion of this Court, anything which could have operated on his mind may be proved. Monroe seems to have lived in habitual fear and alarm, and he probably had good cause.

It is further argued, that the Court erred in rejecting evidence that the deceased was a violent, rash and bloody-minded man, reckless of human life, in the habit of taking advantage of his adversaries in personal contests, and not willing to give them a fair and equal chance in fight, and that the prisoner was well acquainted with his character in this particular. As a general rule, it is true, that the slayer can derive no advantage from the character of the deceased, for violence, provided the killing took place under circumstances that showed he did not believe himself in danger. Yet, in cases of doubt, whether the homicide was perpetrated in malice, or from a principle of self-preservation, it is proper to admit any testimony calculated to illustrate to the jury the motive by which the prisoner was actuated. 3 Stew. & Port., 308.^m And in this view, we think the evidence was improperly ruled out. Reasonable fear, under our code, repels the conclusion of malice. And has not the character of the deceased, for violence, much to do in determining the reasonableness or unreasonableness of the fear under which the defendant claims to have acted? Does it makes no difference whether my adversary be a reckless and overbearing bully, having a heart lost to all social ties and order, and fatally bent on mischief, or is a man of quaker-like mien and deportment?—one who never strikes except in self-defence, and then evincing the utmost reluctance to shed blood?

^m Referring to Quesenberry's case, *post*, in note to Keener's case.

We apprehend that the imminence of the danger, as well as the chances of escape, will depend greatly upon the temper and disposition of our foe. In these cases, every individual must act upon his own judgment, and in view of his solemn responsibility to the law. If the assailant intend to commit a trespass only, to kill him is *manslaughter*; but if he design to perpetrate a felony, the killing is self-defence, and justifiable. 1 Hawk. P. C., ch. 28, §23;^a 1 East C. L., 272. Who, knowing the character of Kyd, the pirate, or of the infamous John A. Murrell, would not instantly, upon their approach, armed with deadly weapons, act upon the presumption that robbery, or murder, or both, were contemplated? We would not be understood as applying these terms, or using this illustration in reference to the *actual character* of the deceased, but to the hypothetical case, made by the bill of exceptions. ●

In the opinion of this Court, there was error also, in refusing to allow the defendant to prove, that, as a justice of the Inferior Court of Lee county, and at the request, and by the appointment of his associates, he became the prosecutor of the deceased for embezzlement, as treasurer, of the poor-school fund of said county; and that, in consequence thereof, the deceased vowed that the defendant should not be at the trial of said indictment, for that he would kill him. As a general rule, it is expedient to receive all the evidence which goes to show the state of feeling of the parties towards each other, at the time of the act committed. And for the same purpose, testimony may be given of lawsuits existing between the parties. *The State v. Zellers*,^o 2 Halst., 220. How strong does this principle apply in the present case. The question to be settled is, was this homicide the result of malignity or of human infirmity or manly caution? To answer this enquiry satisfactorily, we must transport ourselves back to the period when this rencounter took place. We must substitute ourselves in the shoes of the defendant. By becoming the public prosecutor of the deceased, he had

^a Old edition. • See note *sub fin.*

kindled the most deadly grudge in his bosom. He proclaimed his purpose to take his life before the prosecution terminated. His threats and menacing conduct are continued down to the fatal moment when he fell. The prisoner is forced to abandon his practice by day, and to pursue it stealthily by night. To excuse the deadly shot, is he not entitled to have all these facts and circumstances submitted to the jury?

* * * * *

Judgment reversed.

NOTE.—The following is the full text of that portion of the opinion in Howell's case, which relates to the subject under consideration:

WARNER, J.: * * * With regard to the second ground of error assigned upon the record, we are of the opinion the question propounded to the witness, Green, as to threats made by Dill "to drive the defendant from the place or take his life," was legal evidence, and ought to have been answered by the witness. The defendant was charged with an assault *with intent to murder*. This offence must be proved to have been committed, under such circumstances that if death had ensued, it would have been murder, Archbold's Criminal Pleading, 246. Whether the threats of Dill to drive the defendant from the place or take his life, were ever brought home to the knowledge of the defendant, the record is silent. The distinct proposition made by the record is whether it was *competent* for the defendant to prove such threats on the part of Dill, against the defendant. By the 12th section of the 4th division of the penal code, it is *justifiable* homicide to kill a human being in self-defence, or in defence of habitation, property or *person* against one who *manifestly* intends or endeavors by violence or surprise, to commit a felony on either. The 13th section declares, that "a bare fear of any of those offences, to prevent which the homicide is alleged to have been committed, shall not be sufficient to justify the killing. It must appear that the circumstances were sufficient to excite the fears of a *reasonable* man, and that the party killing really acted under the influence of those fears, and not in a spirit of revenge." The 16th section declares, "all other instances which stand upon the same footing of reason and justice, as those enumerated, shall be justifiable homicide." Prince, Ga. Stat., 623-4. The threats of Dill, proposed to be proved by witness, *manifested an intent*, on his part, to commit a felony on the person of the defendant. Whether the evidence was sufficient to excite the fears of a *reasonable* man, or only a *bare* fear that an attack would be made on the defendant's person, by Dill, was a question for the jury to decide. The evidence was competent to show the *quo animo* of the defendant, the circumstances under which he acted. If it had been shown that the threats did not come to the knowledge of the defendant, then, if proved to have been made, they would constitute no justification for him. The error consists in not permitting the whole of

the facts in relation to the threats, to have been proved to the jury. All we can say is, that the question propounded to the witness, as it appears on the record, was a legal and competent question. What effect the answer would have had with the jury, of course we cannot know. All we decide is, that on a trial for murder, or on a trial for an assault with an intent to murder, it is competent, under the provisions of our code, for the defendant to ask a witness, if he did not know that the deceased, or the person assaulted, made any threats to drive the prisoner from the place or take his life. In the case of *The People v. Rector*, 19 Wendell's Rep., 569, [Post, PART II.,] evidence of threats was held admissible, made a week previous to the transaction, by *other persons* than the deceased, who had broken into the prisoner's house, and treated the inmates badly, and who had threatened to return some other night soon after, and break in again, if they were not admitted. Although the threats were not made by the deceased, yet the testimony was offered, and held admissible, to show that the prisoner *had reason to apprehend violence upon his house* at the time the deceased and his companions came there, and that was his reason for using so much force as he did. Mr. Justice COWEN, in delivering his opinion, says: "The *lightness* of a relevant circumstance is no argument for withholding it from the jury. In the prosecution of a crime so essentially the creature of intent as murder, everything pertinent should be submitted to the jury, from which they may infer the absence of malice." Whether the circumstances under which the threats were made by Dill, "to drive the defendant from the place or take his life," were such as to excite the fears of a reasonable man, and to induce the defendant to apprehend violence to his person, so as to justify an attack upon the party making them, was a question for the jury, under the law; and if not a *justification* under the law, it might, in their judgment, have rebutted the presumption of *malice*, on the part of the defendant, which is a necessary ingredient to constitute the offence with which he was charged.

Let the judgment of the court below be reversed, and a new trial granted.

The case of *The State v. Hudgins*, 2 Kelly,—sometimes cited, 2 Georgia—173, referred to in the principal case, was determined in the Supreme Court of Georgia, February Term, 1847. The prisoner was indicted for the murder of John Anderson.

Anderson was hoeing in a field near Hudgins' house, when Hudgins, seeing Anderson's dog, shot and killed it, and sent his children to drag it away. Anderson seeing this, advanced towards Hudgins' house on a run, but dropped his hoe at the end of the cotton row, about two hundred yards from Hudgins' house, and advanced through the yard at a walk, with nothing in his hands, and unarmed. Hudgins waited his approach with a shot-gun, and when a few steps off, shot him in the left breast, and as he was about to fall, struck him on the left cheek with his gun, breaking the barrel from the stock. Anderson immediately died.

The defendant offered to prove, by Anderson Hudgins, his son, that he, Anderson Hudgins, said to his father, as the deceased approached, "Yonder comes John Anderson, *and he will kill you.*" The trial court refused to admit the latter portion of the answer, and the defendant excepted.

Upon this point the Supreme Court, LUMPKIN, J., delivering the opin-

lon. said: "Was the judge below right in ruling out the evidence of Anderson Hudgins, who testified that he said to the prisoner, 'Yonder comes John Anderson, and *he will kill you.*' The witness was permitted to state that he had notified the defendant, that the deceased was approaching, and it was only his opinion as to the *quo animo*, or intention with which he was advancing, that was adjudged to be inadmissible. The doctrine on this subject, is this: where the question is, whether the party acted prudently, wisely, or in good faith, the *information* on which he acted, whether true or false, is original and material evidence. And that portion of the proof which was received, comes strictly within the rule; but the part excluded was the *opinion* only of the witness.

"To justify a homicide, the defendant must depend upon the circumstances by which he was at the time surrounded, and under the influence of which he perpetrated the act. Were they sufficient to excite the fears of a reasonable man? And is it evident that the slayer acted under the influence of those fears, and not in a spirit of revenge? Was the danger so urgent and pressing, at the time of the killing, that, in order to save his own life, the killing of Anderson was absolutely necessary? Does it appear, also, that the person killed was the assailant?

"Now, all these pregnant enquiries must be solved by the *facts* which transpired, and not by the opinion of a bystander, whether that opinion was communicated to the accused or not. Had young Hudgins informed the prisoner, that Anderson was advancing in great haste, apparently much enraged; that he was using threats of personal violence, armed with a weapon, and the like; all this would be admissible to satisfy the jury that the homicide was in self-defence. The opinion of the witness is a very different thing. It would be dangerous in the extreme, to permit the belief of any one, whether sincere or feigned, much more the offspring of accused, to afford a pretext for taking human life." The learned judge then quoted at length, in illustration, Levett's case, Cro. Car., 538; but as this case has been fully quoted elsewhere, it will not be repeated here. [*Ante*, p. 260.]

The principle thus ruled in Hudgins' case, is affirmed in *The State v. Hawkins*, 25 Ga., 207, where it was held proper to refuse to allow the defendant to ask two witnesses, who were present at the killing, "whether, from the conduct, countenance and language of the deceased, immediately preceding the homicide, they (the witnesses) believed the deceased intended to kill the accused." The facts of this last case are given in a note to Sloan's case, *post*.

The principal case seems to be an excellent corrective of the unfortunate rulings in Myers' case which immediately precedes it.

The case of *The State v. Zellers*, 2 Halst., 220, which is also cited in the principal case, and has been frequently cited elsewhere, was tried at an Oyer and Terminer session of the Supreme Court of New Jersey, in 1824. The indictment was for the murder of Zackariah Flommerfelt, esquire. Its value as a precedent cannot be fully understood without setting out the facts and rulings at considerable length.

Flommerfelt had bought some land belonging to Zellers, at sheriff's sale, and was exercising acts of ownership over it, which Zellers and his wife and daughters resisted. On the morning of the homicide, Flommer-

felt went to the barn where a neighbor, Hoffman, was working, told him that Zellers had gone to the field with his gun, and asked him to go with him and help to get the gun away from him. They went ; and when they came opposite to where Zellers was, they stopped, and Flommerfelt said to Zellers, "Good morning, Zellers." Zellers replied, "Good morning." Flommerfelt then asked Zellers what he was making fence upon his possession for. Zellers said it was his own, and told him if he came on it, he would shoot him. Zellers then cocked his gun, and as Flommerfelt was going toward him with a very quick step, setting one foot over the fence, which separated the road from the field where Zellers was, the gun was discharged. Flommerfelt sagged down with his right hand on his knee, and pitching forward, seized the gun with his left, and held it a short time. Flommerfelt let loose of the muzzle of the gun, and wheeled about on his left, holding his right hand upon his right knee, and very much bent, and got over the fence, and then fell down on the bank of the road. . He died in three-quarters of an hour. Hoffman caught Zellers and cried murder, as loud as he could. While he was holding Zellers, the latter told his boy to take a stick and knock his brains out. The boy came towards Hoffman with a stick, but did not strike him. Other neighbors arriving, they bound Zellers with a rope found in Flommerfelt's pocket.

The cross-examination of Hoffman, the principal witness for the State, having assumed considerable latitude, Scott, for the State, objected.

Vroom, for the prisoner : " We intend to prove that the defendant was in possession ; and the evidence is offered to make out that fact, and further, it is offered to show that Flommerfelt treated the wife and daughters of Zellers in a cruel and brutal manner, in order to show the state of irritated feeling and provocation under which the defendant acted."

Scott objected as to the part which related to the possession, because no man had a right to defend his property, (other than his house,) by making use of a deadly weapon. 4 Mass. 396. [Drew's case, *post.*] And as to his treating the wife in a brutal and barbarous manner on Saturday, it could not extenuate the act committed on the subsequent Wednesday.

Vroom : " We have a right to show in what manner he sought to obtain possession. The transaction offered in evidence took place on Saturday, and the offence was committed on the Wednesday following : and that this old man was authorized to defend his possession by force, and to defend his person against a person whom he had a right to believe (from the treatment his wife and daughters had received) was coming to do him some personal injury."

KIRKPATRICK Ch. J.: " It can never be set up that the mere trespass can excuse him. No man can defend his property, (other than his dwelling house,) from a trespasser, by making use of a deadly weapon. But inasmuch as the distinction between murder and manslaughter depends upon the impulse of the mind with which the act was committed, *every circumstance which goes to show the feelings of the parties towards each other*, may be proper. That temper, which at one time might not be excited, might, under the excitement of other circumstances, be more easily roused. and, therefore, it may be received by the jury, to show the state of mind of the parties."

Further on, John Anderson, for the State, testified that there had been

lawsuits between the deceased and defendant; that deceased had recovered a judgment against defendant in the spring of 1822; that defendant was put in jail by virtue of an execution upon that judgment, and witness understood that defendant was released from jail upon an agreement to give up the possession of two of the fields in dispute to Flommerfelt; it was upon one of the fields agreed to be given up, that Flommerfelt was shot.

Vroom asked what the suit was brought for.

KIRKPATRICK, Ch. J.: "Can we go into the investigation of all the legal proceedings between these parties?"

Vroom said that he wished to show that the suit was unjust and malicious; and that while the prisoner was in jail by virtue of that judgment, and under duress, he, in order to release himself from jail, made the agreement to deliver up the two fields.

KIRKPATRICK, Ch. J.: "You cannot go into the fact of proving that the suit was malicious; but may show that if there was any arrangement, it was while the party was in jail and under duress of imprisonment."

Other testimony was heard as to this agreement, made while the defendant was in the jail.

The counsel for the State then offered in evidence, the sheriff's deed to Flommerfelt for the property on which Flommerfelt was shot.

KIRKPATRICK, Ch. J., said: "That cannot be received, as we cannot enquire into the title in this suit."

Much testimony was introduced by the defence, showing the quarrels of the defendant and deceased about the possession of the field in question; attempts of the neighbors to bring about a compromise; the fact that the defendant had given the deceased permission to sow the field with clover seed, and after deceased had got it plowed, had gone with his gun and sowed buckwheat on it himself; the fact that on the Saturday before the killing, the wife and daughter of defendant had gone to the field and commenced building a fence on it, and that deceased had ejected them, using, as it seemed, no unnecessary force.

KIRKPATRICK, Ch. J., charged the jury as follows:

Gentlemen—The defendant's counsel have charged the deceased with unjust and fraudulent conduct towards the prisoner, and upon that unjust and fraudulent conduct, they found their defence; they say, that was the cause which excited the prisoner to do the act. In what did this fraud and injustice of the deceased consist? *First*. The deceased purchased the defendant's estate at sheriff's sale, and paid a fair price for it. In this there was nothing unlawful, nothing which ought to excite the anger of the defendant. *Second*. He prosecutes the defendant in a suit at law, and obtains a judgment against him—sues out execution, upon which the defendant is taken and imprisoned. There is nothing unlawful in this. *Third*. He purchases the possession of a part of the property and enters upon it, and defendant gives him leave to sow grass seed upon it, thereby giving him possession. After this, the defendant interrupts him. Who, then, is the most to blame? It appears to me that the deceased acted in this matter like a fair, rational and honorable man. Would it not, in these circumstances, be right to say that deceased had lawful possession of the land? I think it would. In this situation the event occurs. If it should be believed that the prisoner did not shoot off the gun intentionally, but that

the deceased closed in upon him, seized the gun, and that it went off accidentally in the struggle, the prisoner is not guilty at all. But if you think that was not the case, but believe the principal witness, and that he fired the gun intentionally, he must be guilty either of homicide in self-defence, manslaughter, or murder.

1. Did the defendant believe that deceased was coming towards him with an intent to kill him or do him great bodily injury? There was nothing which could warrant a belief of that kind. If there was nothing to induce such a belief, then he must be guilty of manslaughter or murder.

2. Manslaughter is where a person kills another upon a sudden transport of passion or heat of blood, upon a reasonable provocation and without malice; as, for instance, such a sudden attack upon a man's person, that his mind becomes immediately inflamed, and in the fury of his passion, kills the aggressor. It is contrary to the whole tenor of our law to allow a man to excuse himself from the guilt of killing another by saying, "I got in a passion because he did an unlawful act, or because he entered on my land, and therefore, I shot him." No case can be found in the books to warrant the position, that merely because a man is trespassing on my land, I may kill him. On the contrary, the law on this point is well settled, and has been read to you from 4 Mass. Rep., 396, viz: "That where the trespass is barely against the property of another, and not against his dwelling-house, it is not a provocation sufficient to warrant the owner in using a deadly weapon: and if he do, and with it kill the trespasser, this will be murder, because it is an act of violence beyond the degree of the provocation." [Drew's case, *post.*]

3. Murder is the killing a reasonable being with malice aforethought, that is, with deliberate intention or formed design. And the law presumes all homicide committed with malice aforethought, and, of course, amounting to murder, until the contrary appears from circumstances of alleviation, excuse or justification. And it is incumbent upon the prisoner to make out such circumstances to the satisfaction of the jury, unless they arise out of the evidence produced against him. Has the prisoner made out any such sudden provocation as will reduce the offence to manslaughter? The mere attempt to come upon his land is not such a provocation. Whether there are any other circumstances sufficient for that purpose, you will judge.

* * * * *

Verdict, guilty of manslaughter; sentence, three years imprisonment, and a fine of \$1000.

The necessity of making a pretty full statement of this last case has drawn us into a little digression. It is seen that it relates principally to the defence of property, a matter which belongs to PART III of this volume. It is also seen that the jury are told that if the gun went off accidentally, the defendant was not guilty at all. This was clearly a misconception of the law. In the first place, Zellers was not defending his own possession; for the possession had been surrendered to the deceased. He was, therefore, a trespasser upon the deceased's possession. In the second place, if he had been defending his own possession, he was defending it against a mere civil trespass, not felonious in its character—not irreparable, but for which he could have had full redress by law. Therefore, he had

no right to defend it in the manner and by the means in which he did—that is, by the use of a loaded gun, cocked and presented at the trespasser. *State v. Vance*, 17 Iowa, 138; *Drew's case*, *post*. The means of defence then being unlawful, he was criminally responsible for the death that consequently ensued. See *Benham's case*, *ante*, p. 115, where the doctrine is stated; and *State v. Vance*, 17 Iowa, 146, where it is fully discussed on a state of facts similar to *Zellers' case*.

Upon the other point, namely, that the doing of a lawful act, however much it may in fact aggravate another, will not afford any extenuation of a homicide, see *Hinton's case*, *ante*, p. 83, and note. *Lingo v. The State*, 29 Ga., 484; *Dill's case*, *post*.

In a trial for murder in Louisiana, evidence of a previous quarrel between the defendant and the deceased was excluded, and in the Supreme Court, on appeal, MERRICK, Ch. J., speaking for the Court, said: * * * "The bill of exceptions also shows, that the Court refused to allow the accused to prove a previous quarrel between the deceased and the defendant. The tendency of this last mentioned evidence, if admitted, would have been to aggravate the homicide, and make that appear to be murder, which, under other circumstances, might perhaps, be considered as manslaughter. Had the proof been offered by the State, for the purpose of showing a previous grudge and the malice aforethought, it might have been admissible. The prisoner certainly cannot complain that testimony unfavorable to his case has been excluded. Whart. Am. Crim. Law, p. 377; *Ibid*, 234-5; 5 La. An., 489." *State v. Jackson*, 12 La. An., 679.

The questions of evidence discussed in the principal case, and in *Keener's case*, *post*, and others, leads us to offer a conjecture of our own upon a single point: Although it is a familiar principle that no threats or other mere words can justify a battery, yet it is equally true, that in civil actions for damages for assault and battery, evidence of provocation by words is admissible in mitigation of damages. *Riddle v. Brown*, 20 Ala., 412; *Frazer v. Berkeley*, 7 Car. & Pay., 621; *Stellar v. Nellis*, 60 Barb., 524; S. C. 42 How. Pr., 163; *Richardson v. Northup*, 56 Barb., 109.

In prosecutions for murder, it is likewise a familiar principle, that no threats or other mere words can constitute such a legal provocation, as will reduce a killing from murder to manslaughter. But, nevertheless, should not evidence of previous threats, libels, slanders, quarrels, or other injuries, not sufficient to reduce the *degree* of the crime, be received in evidence, as an ingredient to be considered in determining the *quantum* of the punishment, in case the verdict shall not be such as carries with it the punishment of death?

Ought not the analogy to hold between the criminal prosecution for homicide and the civil action for assault and battery? Should a rule of evidence, which obtains in mitigation of civil damages, generally small in amount, be denied in mitigation of a grievous term of imprisonment? It is true, that this would open a wide latitude of enquiry, but no wider than some courts have opened on other grounds; and would not such a rule lead to a more uniform standard of justice? For, indeed, it seems at the present time, under the exclusionary rules of evidence which obtain in some States, and the great latitude allowed in others, that the *quantum* of punishment which shall follow any crime, is a matter of chance and hazard,

rather than the more uniform result of a sound discretion, exercised by judge or jury, accordingly as this function is reposed in the one or the other, enlightened by all the circumstances surrounding the transaction.

ROBERT JACKSON v. THE STATE.

[UNREPORTED.]

Supreme Court of Tennessee, Jackson, April Term, 1873.

A. O. P. NICHOLSON,	<i>Chief Justice.</i>
P. TURNEY,	} <i>Judges.</i>
ROBERT MCFARLAND,	
JAS. W. DEADERICK,	
THOS. J. FREEMAN,	
JOHN L. T. SNEED,	

RULES WHICH DETERMINE ADMISSIBILITY OF EVIDENCE OF COMMUNICATED THREATS IN TRIALS FOR HOMICIDE—APPEARANCES AND IMMINENCE OF DANGER—OVERT ACT.

1. The general rule, subject, perhaps, to exceptions in extreme cases, is, that in trials of indictments for homicide, evidence of previous threats made by the deceased against the prisoner, and communicated to him before the killing, is admissible, without reference to the question whether there is any evidence tending to show that at the time of the killing, the deceased was doing some overt act manifesting a present intention to carry such threats into execution; or, without reference to the question whether there was proof tending to show that the defendant may have acted upon a reasonable belief that he was in danger of death or great bodily harm at the hands of the deceased. [Acc. Pridgen's case, *ante*, p. 416; Little's case, *post*, next case. Contra, Myers' case, *ante*, p. 432; Hays' case, *post*.]

2. Ordinarily, the Judge cannot assume whether there is evidence tending to prove such a state of facts as would make testimony of such communicated threats relevant; because this would be to decide on the effect of the evidence upon a material question in the case—a matter which belongs exclusively to the jury. [Acc. Pridgen's case, *ante*, p. 416.]

3. What constitutes such an overt act as will warrant a person in slaying his enemy in his own defence, is a question for a jury, to be resolved according to the circumstances of each particular case. No general rule can be laid down upon the subject. [Acc. Cotton's case, *ante*, p. 310; Patten's case, *post*. And see Harris' case, *ante*, p. 276, and the cases there cited.]

4. Previous threats or acts of hostility, however violent they may be, will not justify a person in seeking and slaying his adversary. [Acc. Rip-

py's case, *ante*, p. 345; Williams' case, *ante*, p. 349; Lander's case, *ante*, p. 366; and others. Contra, Carico's case, *ante* p. 389.]

Wilkerson & Wilkerson and *T. E. Richardson*, for the plaintiff in error; *Joseph B. Heiskell*, Attorney-General, for the State.*

McFARLAND, J., delivered the opinion of the Court:

The prisoner was indicted for the murder of Martin Demoss, in Lauderdale county, and was tried and convicted of murder in the second degree. His motions for a new trial, and in arrest of judgment were overruled and judgment rendered, from which the prisoner has appealed to this Court.

The bill of exceptions shows that the State examined three witnesses, two of whom were immediately present and witnessed the homicide; the other was sixty or seventy yards distant. The following is a brief statement of the facts deposed to by these witnesses:

The prisoner, in company with Lucy, one of the witnesses, was on his way home from the "Cross-Roads," late in the evening of Wednesday, the 15th of November, 1871. They entered a lane running north and south, which intersected with another running at right angles.

The deceased with his brother, one of the other witnesses, was in this latter lane, going out to pick cotton. Each party was moving towards the junction of these roads, and at about that point they met. The prisoner was carrying a shot-gun, and when he discovered the deceased, at a distance of forty or fifty yards, he took the gun off his shoulder and cocked it and put it under his arm. When they met, each party bore to the right hand side of the road; nothing was said. When the parties were about opposite each other, the prisoner suddenly turned his gun, and, without raising it to his shoulder, fired, striking the deceased with ten or more buck-shot in the left side, between the ribs and hip bone, and a little to the front. The deceased was also shot through the back of the right hand with three shots, showing that at the moment, the deceased had his right hand

*The counsel for the plaintiff in error made use of the brief filed by Mr. Horrigan in the next case.

upon his left side. Of these wounds he soon after died.

The only other material fact stated by the other witness, who was further off, was, that when the deceased and his brother passed him on the road, they were conversing in an ordinary manner, with no mark of excitement. This was the substance of the proof upon which the State rested the case.

The prisoner introduced a number of witnesses, by whom he proposed to prove the following facts, in substance:

That the deceased had previously manifested very bitter and hostile feelings towards the defendant, and on Wednesday before the homicide, had attacked him in a public road, and compelled him to seek safety in flight, and it was with difficulty the deceased was induced to desist by the interference of the bystanders. The defendant had armed himself with an ax after fleeing a short distance, and stood upon the defensive. The deceased armed himself with a billet of wood, and manifested a determined purpose to press the contest; but finally left, saying he would see defendant and have satisfaction at another time. That on the same day he told a witness that he had just had a difficulty with the defendant that morning; that he had sold his crop to Mr. Wakefield, and as soon as he got his pay, which would be in a few days, he was going to kill Jackson, the defendant, and go to Arkansas; that he and Jackson both could not live. This conversation was repeated to the defendant the next day by the witness. The same threat in substance was made to another witness on the same day, and also repeated to the defendant on the next day. On the day before the homicide the deceased said to another witness, after a good deal of boasting in regard to his difficulty with the defendant, that he would have satisfaction out of Jackson before he left the country. This was communicated to the defendant the morning of the homicide.

The defendant proposed to prove that the deceased had insulted and assaulted him on another occasion, previous to the affair on Monday first spoken of.

It was proposed to prove by a number of witnesses, that the deceased was one of the most turbulent, reckless, relentless, revengeful, dangerous characters ever known to the witnesses; a man of herculean physical power, and a terror to the whole neighborhood; that defendant was informed by other witnesses of other threats; was a feeble man, afflicted with rheumatism, and was advised to go armed to defend himself.

The judge sent the jury from the room when the testimony was offered, heard from the witnesses the testimony proposed as above, and held it all inadmissible. Except the Court held that the defendant might prove the existence of unfriendly feeling between him and the deceased, but nothing more. It is manifest that the effect of this, taken alone, would be more against the prisoner than in his favor. This raises the question for our determination.

In the first place, we think the practice adopted by the judge, in sending the jury from the room while the question as to admissibility of the testimony was being discussed, not only not objectionable, but highly commendable. If the testimony was incompetent, it was certainly not error to refuse to allow the jury to hear the defendant propose to make proof.

The question, however, is, was this testimony, or any part of it, admissible?

The reasoning upon which the judge acted, and the argument made here with much earnestness in support of his ruling, may be stated as about this: That no previous threats or acts of hostility, however so violent, will justify the party in slaying his adversary. To excuse a homicide the danger of life or great bodily harm must be real, or honestly believed to be so, and must be imminent and apparent at the time. That there must be some overt act at the time, indicating a present purpose upon the part of the deceased to take the life of the defendant or do him some great bodily harm. That it is only when the proof shows some such overt act at the time of the homicide, that previous threats, previous difficulties, and

the character of the deceased, might be introduced and considered, in connection with such overt act, to enable the jury to determine whether the defendant acted under the honest and well-founded belief that he was at the moment in imminent peril of his life. That it is the province of the Court to say *when there is evidence*; and as the judge was of opinion that there was no evidence of such overt act upon the part of the deceased at the time of the homicide, it resulted that it was within his province to exclude the evidence offered, of previous threats, etc., from the jury, as it could not be available as a defence.

We fully assent to the first proposition maintained by the Attorney-General, that is, previous threats or acts of hostility against the defendant, however violent they may be, will not of themselves justify him in seeking and slaying his adversary; that it must appear that it is necessary to do so, in order to save his own life from the threatened danger.

To excuse the slayer, he must act under an honest belief that it is necessary at the time to take the life of his adversary in order to save his own; and it must appear that there was reasonable cause to excite this apprehension. See *Rippy v. The State*,^a 2 Head, 217; *John C. Williams v. The State*,^b 3 Heisk., 376.

These are authorities holding a somewhat different doctrine, but we cannot yield to them.^c

But the question here is—what evidence may be heard by the jury, in order to enable them to determine whether or not the defendant is excusable under the principle above stated? We concede, as we have already said, that to make out this defence, the defendant must act under an honest and well founded apprehension, that it is necessary at the time to take the life of his adversary, in order to save his own. But, surely, in showing the grounds of this apprehension, he should

^a *Ante*, p. 345. ^b *Ante*, p. 349.

^c Philips' case, *ante*, p. 383; Carico's case, *ante*, p. 389; Bohannon's case, *ante*, p. 395.

not be confined to evidence of what occurred at the moment of the homicide. It is said, there must have been an overt act of the deceased at the time, showing his deadly purpose; but what is an overt act, and who is to judge whether or not there was such an overt act? If the parties, previous to the fatal meeting had been friends, with no hostile feeling, the deceased, a person of mild temper, certainly an overt act upon the part of the deceased, that would have justified the defendant in taking his life, upon the assumption that it was necessary to do so in order to save his own, ought to be some demonstration of a very decided character, indicating a deadly or dangerous purpose. On the other hand, if the parties were deadly enemies, and the deceased had previously made attempts or threats against the life of the defendant, and was known to be a person of violent and dangerous character, likely to execute his threats, then, in such case, upon the parties meeting, the defendant would not necessarily be bound to wait until his adversary had actually drawn a deadly weapon, or was in the very act of striking.

The necessary overt act in the one case, might be different from the other. It is difficult to lay down a rule strictly governing all cases, the circumstances of the cases differ so widely. The overt act that will justify a defendant, in assuming that his own life is then in danger, must depend upon the circumstances of each particular case. Cases may be readily supposed, and, no doubt, in reality often occur, when to require a defendant to wait until his adversary actually begins the combat, would be to require him to wait, until there would be but little chance left of successful defence; cases where the deadly purpose of the party is so fixed and determined, his character so reckless and bloody, his use of deadly weapons so expert and skillful, that to await his attack would be to await almost certain death; and the result of the rencounter would often depend upon which party was the quicker in action. In cases of this character, where the parties

meet, a very slight movement might justify either party in acting at once upon the assumption that his life is then in instant peril; or, cases might occur, where the fact that the deceased met the defendant under the particular circumstances, and in connection with previous facts, might show that the deceased sought the meeting with a deadly purpose, and be itself an overt act.

These are, doubtless, extreme cases; but they are used to show that the "*overt act*" spoken of, is a question depending upon the entire circumstances of each particular case, and also to illustrate the meaning of the expression that "the danger must be imminent at the moment." These expressions must be understood in their proper sense, and as applied to the facts of each case; and to show that the defendant's fear was honest and in good faith, it should appear that the circumstances were such as would naturally create this apprehension in his mind, not that he was in actual danger. One party might assail another with a gun or pistol in such a manner as to create an honest belief in the mind of the latter, that his life was in instant peril, and yet it might, in reality, afterwards appear that the gun or pistol was not loaded, and the attack was really feigned; but if this was not known to the party assailed, and the circumstances were such as were reasonably calculated to deceive him, his defence would certainly be as complete as if the danger had been real; and in this sense must be understood the remark, that there must be reasonable ground for the defendant's action.

Now, it is very apparent, that in all cases where previous acts of hostility and threats upon the part of the deceased, in connection with his character, and the facts immediately attending the homicide, may establish the fact, that the defendant, in taking his life, acted under the belief that his own life was in peril, the testimony should be heard; otherwise, the true attitude of the parties, and the grounds upon which the defendant acted, and his state of mind, would not appear.

But the argument of the Attorney-General is, that this testimony should not only be heard, where the facts attending the homicide show that it might justify the defendant's conduct; that it is the duty of the Judge to determine, whether in the facts attending the homicide, there is any evidence showing an overt act of the deceased at the time; if not, the testimony should be excluded, as in this case. The cases put by the Attorney-General, by way of illustration, are extreme; as if it should appear that the deceased at the time he received the fatal blow, was asleep, so he could not have committed an overt act. It would seem very clear, that no amount of previous threats would justify a jury in such a case, in acquitting a defendant upon the ground that he then acted under fear of his life; but whether in such a case the judge should exclude the evidence altogether, we do not decide. Such, at any rate, is not the present case. The rule, that it is the province of the judge to decide, if there is any evidence, is, no doubt, a correct one, when properly applied; but here, for the judge to decide that there was no evidence of an overt act or hostile demonstration upon the part of the defendant at the time of the homicide, sufficient to admit proof of previous threats, was necessarily to decide the very question upon which the case turned, and which was the peculiar province of the jury.

The evidence of the facts attending the homicide was before the jury. What was the effect of this evidence? what results were established by it? were questions for the jury, and the judge was not authorized to decide, that in the facts deposed to by the witnesses, there was no evidence of self-defence, or that there was no evidence of passions excited by adequate provocation, to reduce the offence to manslaughter. However clear these propositions may have appeared to the Judge, they are, nevertheless, questions for the jury. While the Judge was in form deciding, that there was no evidence of the given proposition, he was, in effect, deciding upon the

weight and effect of the evidence upon a point vital to the case.

We are not aware that this direct question has been before this Court. The case of *Harmon v. The State*, 3 Head, 243, relied upon by the Attorney-General, was a conviction for an assault and battery. The evidence rejected in that case, was offered to show the bad and dangerous, and desperate character of the prosecutor, of his numerous assaults upon *other parties*; it was held that the evidence was properly rejected.

Judge WRIGHT said: "In an indictment for assault and battery, the character of the prosecutor can, as we apprehend, never be made a matter of controversy, except when involved in the *res gestæ*. Since the fact that he may be an overbearing, tyrannical and dangerous man, in the habit of assaulting *other parties*, furnishes no legal excuse to the defendant to assault *him*. The defendant may prove that he was acting in self-defence, or he may exhibit whatever provocations were given to him by the prosecutor, but he cannot set up general reputation, or the conduct of the prosecutor towards others as a defence. When, however, it is shown that the defendant was under reasonable fear of his life or great bodily harm from the prosecutor, the prosecutor's temper, in connection with previous threats, etc., is sufficiently part of the *res gestæ* to go in evidence, as explanatory of the state of defence in which the defendant placed himself: citing Whart. Cr. L., 234-5; 3 Iredell, 424^d; *Wright v. The State*,* 9 Yerg., 342. And he adds

^d *State v. Tilly*, *post*, note to Lamb's case.

*The only point in this case necessary to be stated in connection with the law of self-defence, will be found in the following extract from the opinion of the Court, delivered by TURLEY, J.: "The second cause assigned as error is, that the Court refused to hear proof to show that the prosecutor, Underwood, who is a free man of color, is a turbulent, insolent, saucy fellow. We think there is no error in this; for, supposing him to have been of the character described, we cannot see how this would have extenuated the offence of stabbing him, and most certainly the prisoner does not stand in such a relation towards him, as to justify his being very particular in demanding respectful treatment from him."

that the proof of the prosecutor's bad temper would have been relevant and admissible in that case; but the defendant's position was made too broad, and was, therefore, at fault. In the case of *John C. Williams v. The State*,[†] 3 Heiskell, 376, Judge NICHOLSON, in reviewing the facts, held that the conviction of murder in the second degree was well sustained by the evidence, upon the ground that it did not appear, that, at the time of the homicide, the deceased was making any demonstration against the defendant, or that the defendant acted under apprehension of danger to himself, and yet the evidence of previous hostile demonstrations and threats by the deceased, was considered relevant and its effect discussed. It is true, no objection appears to have been taken in that case.

This seems to have been the course in other cases. See *Copeland v. The State*, 7 Humph., 429. In fact, we think the practice has been very general to admit proof of this character, and leave its effect to be determined by the jury, with proper instructions. We are not to be understood as intimating any opinion upon the facts of this case, or as to the effect that a jury ought to give to evidence of the character offered, in connection with the acts immediately attending the homicide.

The principle of self-defence, as laid down by this Court in the case of *Grainger*,[‡] and subsequent cases modifying that case, while of vital importance, has, no doubt, been much perverted and misapplied, and when thus misapplied, has, no doubt, resulted often in the acquittal of guilty men;—but judges are not on this account to take away from the jury the trial of the accused.

We regard the question presented as one of great importance.

We do not find in the cases from other States, furnished by counsel, any satisfactory discussion of this precise question. They discuss other questions of interest bearing upon this, more or less directly, but ques-

[†] *Ante*, p. 349. [‡] *Ante*, p. 238.

tions generally satisfactorily settled by cases in this State. We confess the weight of the argument—that if the judge can see that proof of previous threats and hostile demonstrations, should constitute no defence to the prisoner, why permit the evidence to be heard.

And we do not say that cases may not arise, such as the case supposed by the Attorney-General, when it appears absolutely impossible that the defendant could have acted under a fear of danger from the deceased at the time, that the court might not properly refuse to allow evidence of previous threats. We leave cases of this character to be determined when they arise.

But such is not this case. It was not impossible that the defendant could have acted under an honest fear of his own life. We express no opinion upon the facts further than this. The effect the jury should give to the proof of previous threats, etc., would depend upon their opinion as the entire facts and circumstances. They should be fully instructed upon the principles applicable, and particularly that previous threats, etc., no matter of what character, would not of themselves justify the defendant in slaying his adversary.

We think the error of the Court below consists in this: the judge undertook to decide upon the effect of the evidence for the State; that, in this testimony, there was no evidence that would have authorized the jury to find the defendant excusable upon the ground that he acted under a reasonable fear of his own life, no matter what previous threats and hostile acts might have been proved. For it results in this, at least: no matter how clear this may have been to the judge, it was a question for the jury. If he could decide this in one case, he could in all cases. We hold that the proof of previous hostile demonstrations upon the part of the deceased, towards the defendant, as well as previous threats, and the character of the deceased, which might illustrate how much importance should be attached to his threats, were all properly admissible; but the proof offered of particular acts of hostility towards other parties was properly re-

jected;^b and, for the error of the Court on this question, we reverse the judgment, and award a new trial.

Judgment reversed.

LITTLE v. THE STATE.

[UNREPORTED.]

Supreme Court of Tennessee, Jackson, April Term, 1873.

A. O. P. NICHOLSON, *Chief Justice.*

P. TURNEY,

ROBERT MCFARLAND,

JAS. W. DEADERICK,

THOMAS J. FREEMAN,

JOHN L. T. SNEED,

} *Judges.*

UNCOMMUNICATED THREATS—CHARACTER OF DECEASED FOR VIOLENCE—INSTRUCTIONS TO JURY—MANSLAUGHTER.

1. Robert Jackson's case, *ante*, last case, referred to as furnishing the reasons for the conclusion arrived at in this case.

2. In trials for homicide, evidence of the violent and dangerous character of the person slain is admissible, without reference, it seems, to the question whether there is any evidence in the case showing that at the time of the killing, the defendant was in danger, real or apparent, of death or great bodily harm, at the hands of the deceased. [See Robertson's case, *ante*, p. 152; Cotton's case, *ante*, p. 310; Wesley's case, *ante*, p. 319; Rippy's case, *ante*, p. 348; Monroe's case, *ante*, p. 442; Keener's case, *post*; Sloan's case, *post*; Tacketts' case, *post*, and those following it.]

3. In trials for homicide, evidence of threats made by the deceased person against the prisoner, but not communicated to the prisoner before the killing, is admissible in all cases where the acts of the deceased in reference to the fatal meeting are of a doubtful character. [Acc. Campbell's case, *ante*, p. 282; Copeland's case, *ante*, p. 41, where such evidence appears to have been admitted; Goodrich's case, *post*; Holler's case, *post*; Cornelius v. Com., 15 B. Monroe, 539; Scoggin's case, *post*; Stokes' case, *post*; Pitman's case, *post*. Contra, Coker's case, *post*; Atkins' case, *post*; Chambers v. Porter, in note to Goodrich's case, *post*. And see Quesenberry's case, *post*; Powell v. State, 19 Ala., 581.]

4. In trials for murder, the refusal to instruct the jury upon the law of manslaughter is erroneous; because it discloses the opinion of the judge

^b So held in *People v. Henderson*, 28 Cal., 469.

upon a material question of fact, and is hence an invasion of the province of the jury. [Contra, in principle, Harrison's case, *ante*, p. 71; Shippey's case, *ante*, p. 137; Shorter's case, *ante*, p. 256; Evans' case, *ante*, p. 329; MORGAN, J., in Lamb's case, *post*; Johnson v. State, 27 Tex., 766, and cases cited.]

The defendant was indicted in the Criminal Court of Shelby county for the murder of John Sims; was convicted of murder in the second degree, and his punishment was fixed by the jury at eighteen years in the penitentiary. Hon. John R. FLIPPIN, Judge, presiding.

The defendant and deceased were colored persons.

The killing took place in the streets of Memphis, between one and two o'clock, on the afternoon of May 12, 1873. The defendant and two others were going out on foot to look at a lot, which the two latter had purchased. They met the deceased casually in the street. According to the testimony of the two men who were with the defendant, the deceased was first seen approaching them at a rapid gait, swinging his hands like any other person while walking. When the deceased had approached to within about twelve feet of the defendant and his party, the defendant called out, "Halloo! Cap., is that you?" and, immediately thereafter, fired a pistol at deceased.

The only other testimony of what occurred up to the time of the firing of the first shot, was the dying declaration of the deceased, to the effect that he was walking along the street, and did not see defendant until after the first shot was fired, and that this shot, as well as the other two, was fired *from the rear*. From the moment of firing the first shot, all the testimony—the dying declarations of the deceased, the testimony of the defendant's two companions, as well as that of several other persons whose attention was attracted by the firing—concurs in showing that the deceased ran, and the defendant pursued and fired, in quick succession, two other shots, the last of which brought the deceased to the ground; when the defendant immediately ran up to him, and struck him several blows with a stick, the butt end of which was loaded.

One of the wounds in the back was *mortal*, and the deceased died the following day.

Attempts were made by the defendant to prove—

1. That a little more than a year previous to the killing, the defendant had escaped from an attempted assassination at the hands of the deceased—the latter having shot and stabbed him—and that he was suffering from the effects of these wounds at the time of the homicide.

2. That at the time of the killing he was still suffering from the wounds thus occasioned.

3. That from the time of the attempted assassination down to the time of the killing, the deceased had made frequent threats against the defendant, of the most malignant character: saying that he would kill him; exhibiting deadly weapons, and saying that he carried them for him; declaring that he would kill him if he was the last man in the world; that he carried a poisoned bullet for him, etc.; and that these threats had been repeatedly communicated to the defendant.

4. That the deceased was an unruly, bad and dangerous man, who had been heard to boast of killing men; that his neighbors were afraid of him, and would have nothing to do with him.

5. That the deceased was in the habit of carrying a pistol and a dirk, and was quick and active in the use of deadly weapons.

The learned judge who presided at the trial rejected all this testimony, on the ground that there had not been proven at the time of the killing, any overt act on the part of the deceased, indicating an intention to carry such threats into execution, or otherwise to inflict upon the defendant great bodily harm. He also refused to allow the defendant to exhibit to the jury the wounds he had received from the deceased.

L. B. Horrigan, for the plaintiff in error; *Joseph B. Heiskell*, Attorney-General, for the State.

McFARLAND, J., delivered the opinion of the Court :

This was a conviction of murder in the second degree. From the judgment the prisoner has appealed. Without discussing the case at length, we announce as our opinion, that the Judge of the Criminal Court erred in rejecting the evidence offered by the defendant, of previous threats made by the deceased against the prisoner, and of the character of the deceased. The case, upon this question, is similar to the case of Robert Jackson v. The State,* decided at the present term. The opinion in that case, gives the reasons upon which our determination of the question rests, and we deem it unnecessary to repeat them again, but refer to that case for the law, as we understand it, upon the question.

That case also settles the questions made in the present case, as to the law applicable to that class of cases. where the prisoner claims to have acted under an honest and well founded apprehension that his own life was then in imminent peril.

In the present case, the prisoner offered proof of threats made against him by the deceased, which had been communicated to the prisoner. The rejection of this, as we have said, was determined to be error, in the case of Jackson v. The State, before referred to. But this different question is presented in this case. The prisoner offered proof of other threats made against him by the deceased, but which had not been communicated to the prisoner, and this proof was likewise rejected. The true rule upon this question, we apprehend to be this: Previous threats of the deceased, *communicated to the prisoner*, tend to show the state of mind of the prisoner; the apprehension under which he was acting; and tend to illustrate his conduct and motives, in connection with the other facts and circumstances of the case. Previous threats of the deceased against the prisoner, *but not communicated to him*, do not furnish the same evidence of the motives brought to bear upon the

* *Ante*, last case.

prisoner's mind, and are not admissible for the same purpose. But in all cases, where the acts of the deceased, in reference to the fatal meeting, are of a doubtful character, then, evidence, which may tend to show that he sought the meeting, or began or provoked the combat, is admissible. And in this view, previous threats by the deceased, though not communicated to the prisoner, may yet tend to show the *animus* of the deceased, and to illustrate his conduct and motives, and, in some cases, might be important, in the absence of more direct evidence, to show which party began or provoked the fight. Threats of this character are, in proper cases, admissible, but for a different purpose from the former class of cases. See upon this question, *Campbell v. The People*,^b 16 Ill., 17, 18; *Keener v. The State*,^c 18 Ga., 194; 1 Kelly (Ga. R.) 220; *Nelson v. The State*,^d 2 Swan., 237, 262; *Copeland v. The State*,^e 7 Humph.; 429.

The present case does not present as clear grounds for the admissibility of this evidence as many others; but we deem it a proper case to admit the evidence, and leave its effect to be determined by the jury under proper instructions.

We think the Judge erred in declining to instruct the

^b *Ante*, p. 282. ^c *Post*.

^d In Nelson's case, the Supreme Court of Tennessee, CARUTHERS, J., say: "They, [the jury] could have no difficulty, under the proof in this case, as to the fact of killing; but whether it was done upon malice or passion, so as to make a case of manslaughter or murder; that is, whether the facts proved, were sufficient to remove the legal presumption of malice, arising from the act of slaying, and the weapon used, and the former threats, would constitute their only difficulty. To come to a conclusion on this question, they would have to carefully weigh the concomitant facts, such as the commencement of the quarrel by the deceased that day; the remark of the prisoner that he had nothing against him; the relative size and strength of each; the appearance of the ground on which they fought, evidencing mutual combat; the condition of the clothes and person of Nelson and the deceased, tending to show the same. *They would also look into the state of Sam's [the deceased's] feelings towards Nelson, as indicated on that day and previously, as circumstances, making it probable, that he might have made the attack, and produced a state of the case that would reduce the killing to manslaughter.*" ^e *Ante*, p. 41.

jury, as to the law of manslaughter. The record shows that the Judge told the jury, that he intentionally omitted to charge them upon this question.

This, we have held to be error, after full consideration, in recent cases. This, in effect, is to tell the jury, that if the prisoner is guilty at all, in the opinion of the Judge, his crime cannot fall below murder in the second degree.

This, we think, is invading the province of the jury. See Poll and Mahoffy v. The State, *manuscript*.

We do not deem it necessary to discuss the other questions argued. They will be found well settled, as we think, by other cases.

For the errors indicated, the judgment is reversed, and a new trial awarded.

Judgment reversed.

THE STATE v. HAYS.

[23 Mo., 287.]

Supreme Court of Missouri, St. Louis, March Term, 1856.

WILLIAM SCOTT, }
JOHN F. RYLAND, } *Judges.*
ABIEL LEONARD, }

ADMISSIBILITY OF EVIDENCE OF COMMUNICATED THREATS IN TRIALS FOR HOMICIDE—PROVOKING DIFFICULTY IN ORDER TO HAVE PRETEXT FOR KILLING ADVERSARY.

1. Where it was clearly proved that there existed on the part of the prisoner, an intense feeling of hatred towards the deceased, and that the prisoner had made violent threats against the life of the deceased, and on the day of the killing made declarations indicating violent hatred towards him; and that the prisoner armed himself with a deadly weapon, and deliberately sought a difficulty with the deceased, and killed the deceased;—*held*, that the fact that the circuit judge refused to admit evidence of threats made by deceased against the prisoner, which threats had been communi-

cated to the prisoner—the record not showing *when* such threats were made—furnished no ground for the setting aside of a verdict of murder in the first degree. [Acc. LINDSAY, J., in Pridgen's case, *ante*, p. 425; Myers' case, *ante*, p. 437; and as to the point that the threats must be recent in point of time, see Sloan's case, next following.]

2. But if the deceased had attacked the defendant, or made efforts to take advantage of him in a personal difficulty, in such a manner as to give the defendant reasonable ground to suppose that the deceased meant to do him some great bodily harm; and the defendant had, to prevent this, killed the deceased, then the proof of previous threats by the deceased against him, would have been highly important testimony, if recently made known to the defendant.

3. But the rule which the Court deduces from the cases is, that evidence of such threats will not be admitted, unless they were *recent*, or continued down so as to become nearly coeval with the killing; and where, as in this case, the record does not show *when* the threats were claimed to have been made, this is a sufficient ground for excluding evidence of them.

4. Meade's case, *post*; Rector's case, *post*; and Monroe's case, *ante*, p. 442, reviewed and distinguished from this case.

5. The following instructions, embracing the law of self-defence as applicable to this case, are held to be free from error:

a. If the defendant, with a spade in his hand, took a position near the deceased, and gradually approached him, and pushed him, for the purpose of inducing an altercation and getting a chance to kill him, and commenced raising his spade at the same time the deceased commenced drawing his pistol, and then struck and killed the deceased, he is guilty of murder in the first degree; and in such case it would be no defence, even if the evidence showed that the deceased drew his pistol before the defendant commenced raising his spade; for the law will not permit a man thus to induce a provocation, and so take advantage of it. [See Adams' case, *ante*, p. 208; Stewart's case, *ante*, p. 191; note to Stoffer's case, *ante*, p. 220.]

b. In such case, although the deceased was attempting to draw his pistol, or had it drawn, at the time the defendant struck the fatal blow; and although the defendant's life or person was in imminent danger; yet, if the defendant intentionally brought on the difficulty for the purpose of killing the deceased, he is still guilty of murder in the first degree. [Acc. Hill's case, *ante*, p. 199.]

c. If the defendant, with a spade in his hand, took a position near the deceased, and gradually approached and pushed him, for the purpose of inducing an altercation for the purpose of killing him, and did kill him with the spade; then, although the deceased drew his pistol at the time defendant raised his spade, or even before he commenced raising his spade, the defendant is guilty of murder in the first degree. [Compare Baker's case, *ante*, p. 75.]

d. If the defendant, with a spade in his hand, took a position near the deceased, and gradually approached and pushed him, in such a manner as to give the deceased reasonable cause to apprehend a design on the part of

the defendant to do him some great personal injury, and to apprehend that there was imminent danger of such design being accomplished, then the deceased had a right to draw his pistol, and even to kill the defendant; and if the defendant, under such circumstances, killed the deceased, he cannot be acquitted. [Acc. Baker's case, *ante*, p. 75; Hinton's case, *ante*, p. 83, and *note*; Lingo v. State, in *note sub fin.*]

e. If the defendant killed the deceased with a spade, the law presumes that it was murder in the absence of proof to the contrary; and it devolves upon the defendant to show, from evidence in the case, to the reasonable satisfaction of the jury, that he was guilty of a less crime or acted in self-defence. [Acc. Head's case, *ante*, p. 341. But see Stokes' case, *post.*] The fact that this instruction does not state the *degree* of murder which will be presumed from the killing with a deadly weapon, does not render it erroneous, although, under the Missouri Statute, the presumption is to be that of murder in the second degree.*

f. But if the defendant, in the lawful defence of his own person, struck and killed the deceased, who was at the time attempting to draw from his pocket a loaded pistol to shoot the defendant, or do him some great personal injury, and there was immediate danger of such injury being accomplished, then the defendant had a right to strike the deceased in the necessary defence of himself, unless the defendant, with a design of killing the deceased, or doing him some great bodily injury, sought the difficulty and provoked the deceased to draw his pistol. [Acc. Selfridge's case, *ante*, pp. 24, 25; Neeley's case, *ante*, p. 96; Hill's case, *ante*, p. 199; Stewart's case, *ante*, p. 191; Adams' case, *ante*, p. 208; note to Stoffer's case, *ante*, p. 220; Evans' case, *ante*, p. 329; Rippy's case, *ante*, p. 345.]

g. If the jury find from the evidence that the defendant, in the lawful defence of himself, gave the deceased the blow which caused his death, whilst the deceased was attempting to draw a loaded pistol, and there was reasonable cause to apprehend a design on the part of the deceased to shoot the defendant, or do him some great personal injury, and there was immediate danger of such design being accomplished, then the defendant had a right to strike the deceased in the necessary defence of himself, unless the defendant, with the design of killing the deceased or, doing him some great injury, sought the difficulty, and provoked him to draw his pistol.

6. Malice in its legal sense, defined and discussed.

The facts are stated in the opinion.

J. B. Clark, and *J. Davis*, for the prisoner; *Gardenhire*, Attorney-General, for the State.

*The statute referred to, after defining murder in the first degree, provides that "all other kinds of murder at common law, not herein declared to be manslaughter, or justifiable or excusable homicide, shall be deemed murder in the second degree." 1 Wagner's Stat., p. 446, § 2. For the construction of this statute, see *State v. Joeckel*, 44 Mo., 234.

RYLAND, J., delivered the opinion of the Court:

* * * * *

In order properly to weigh the objections set forth in the second and third points, that is, as to the rejection of the testimony in regard to threats made by deceased against the prisoner, and the rejection of the evidence, showing that the prisoner was advised to abscond in order to save himself from mob violence, it will be necessary and proper to state the evidence, which I here set forth at large, as appears from the record.

[Here the learned Judge quoted the testimony at full length, from which it appears that Hays, the defendant, was at Lewis & Co.'s store in Glasgow, on the day the killing took place. Brown, the deceased, came to the store. When Hays saw Brown, he picked up a spade, enquired the price of it, and commenced inching up towards Brown. Hays said "boo," to Brown, and afterwards accused Brown of pushing him; said "You pushed me," or, "Do you push me, you damned rascal?" Brown replied "No, you pushed me." Hays said, "I don't allow you to speak to me." Hays then dealt Brown a blow with the spade, which crushed in his skull and caused his death. There was testimony to the effect that Brown had drawn, or was in the act of drawing, a pistol, when he fell. The pistol was a six-shooter, loaded and capped. The defendant called as a witness, one Joseph Davis, who said that when Hays was in the store at the time of the difficulty, Brown came up to the door, and Hays, when he saw him, said "boo!" at him, throwing his hands forward. Then Hays went to the further end of the store, took up a spade, and made a remark about spades, and walking out of the front door, took up his stand near Brown, who was standing in the door; then kept gradually getting nearer to Brown; gave him a hunch or push, and at the same time, exclaimed, "Don't push me!" and Brown, stepping back, drew his pistol, and was holding it in both hands as if trying to cock it, at the time that Hays, advancing, struck him with the spade, with both hands,—the muzzle of the pistol being

in the direction of Hays. Other testimony was introduced, tending to impeach this testimony of Davis, and it will be seen that it was not credited by the Supreme Court.

Immediately after the killing, Hays made declarations indicating the most malignant feelings against Brown; exhibited a knife, and said he had sharpened it for him; said, if that stroke did not kill Brown, he would have another chance at him; also enquired of the bystanders if they did not see the pistol Brown drew on him; and said it was damned strange no one saw it. Before the affair happened, when Hays saw Brown come into town, he was heard to say that, whenever he saw that *thing*, it put the devil in him as big as a ground-hog, and that he could make a better fight than was ever made in that town. In July, previous to the killing, Hays and Brown had had some difficulty at a public speaking in Glasgow; and Hays on that occasion was heard to make the most malignant threats against Brown; said that he could wade in his heart's blood; that he could kill him like a sheep-killing dog. During the fall before the killing, Hays and some of his friends stopped on horseback before the place of Brown, where Brown was engaged burying scions; Hays used abusive language towards Brown, and accused him of stealing money from him. Hays was drunk on both of these occasions. Hays introduced testimony, tending to show that Brown gave the first insult at this last quarrel, and that he did not draw a pistol upon Brown upon that occasion. The part of the testimony relating to the flight of the prisoner, we have omitted.

The learned Judge then proceeded as follows :]

Before the defendant closed his testimony, he offered to prove that Brown, before the day of the fatal affray with Hays, had threatened to shoot Hays, of which Hays had been informed before the difficulty. All of which, being objected to by the prosecution, the Court sustained the objection, and refused to permit said evidence to be given to the jury; to which opinion the defendant ex-

cepted. The defendant then offered to prove that, at the time he left the county of Howard, after being bailed out on the first commitment, he was advised to do so for a short time, until the excitement was over; and that he was also advised that his life would be in danger from mob violence, unless he kept out of the way.

The second point is in relation to the threats of Brown against the defendant. On this subject the record is very short, and is as follows: "Defendant then offered to prove that Brown, before the day of the fatal affray with Hays, had threatened to shoot Hays, of which Hays had been informed before the difficulty." In a case where threats of the deceased might be used in evidence, this statement would not be considered sufficient to warrant the admission. It is not stated here when the threats were made; whether they were of long standing or of recent existence. For aught that appears, they may have been made months, perhaps years before, and they may have come to the knowledge of Hays months before, or they may have been very recent. From the record, we can not tell when the threats were made; whether they were old or recent, or when Hays was first informed of their existence. This might be a sufficient answer to this point, but I will notice it yet further. Here the fact of killing, with all the circumstances, has been clearly proved. Hays, the defendant, has been proved to have manifested a most bitter and revengeful feeling toward his victim; he says to one of the witnesses, "that he never would be satisfied until he killed Brown, Harvey and Markland;" to another, on the same day on which he inflicted the fatal blow, "that whenever he saw *that thing* (Brown) it put the devil in him as big as a *ground-hog!*" and to a third, on the same day of the affray on which Brown received his death-blow, Hays said, on seeing Brown passing along the street, "that when he saw that man, it made his blood boil." With this feeling of a heart festering with a rancorous hatred toward Brown, Hays saw Brown standing at the door of a store in which Hays was, and he immediately, on seeing Brown, threw

up his hands towards him with an exclamation; the clerks in the store observed it. He then walked back towards the rear of the store-room, some thirty or forty feet long, and that distance from Brown, picked up a spade, and walked with it out to the front of the store, and stood on the pavement with the spade in his hand. He began gradually to approach his victim, (as the witnesses describe him, *inching up towards* Brown,) and, at length nudged him with his elbow, exclaiming, at the same time, "Do you push me, you damned rascal?" Brown replied, "No, you pushed me;" then Hays struck Brown with the spade, breaking his skull, and causing his death in a few days. Brown had a pistol in his hand when he fell; and one witness says he saw the pistol in the hands of Brown, pointing towards Hays, before Hays struck him. But other witnesses—three or four—did not see any pistol; and some of the witnesses—two or three—are certain that Brown had not a pistol drawn when Hays struck him. He was talking with one of the witnesses about planting hedges, with his arms folded across his breast, when Hays pushed him. There cannot be a rational doubt in the mind of any one acquainted with criminal law, and conversant with its administration, that the facts in proof in this case, make the homicide of Brown by Hays, murder in the first degree. Here is malice plainly and expressly proved; here, the weapon is a dangerous one; here, the blow is given without even an insulting word—not the slightest provocation; here, the prisoner voluntarily seeks the opportunity; he takes a dangerous instrument in his hand and walks some thirty or forty feet towards the deceased; then, with sly and stealthy motion; *inching up towards* his victim, he pushes him, and as his victim is retreating, or giving back into the house, he strikes the fatal blow, and thus takes his life. Upon such a transaction as this, what good to the prisoner would proof of previous threats against him by the deceased, have produced? Could they have changed the facts? could they have altered the routine of events in their melancholy

detail? or would such threats have altered the law? Surely not. The proof of threats made by Brown against Hays, under the circumstances of the killing in this case, as they are set forth in the bill of exceptions, would, in my opinion, have been against the prisoner. It was his duty, if he had known or heard of such threats, to avoid his enemy, rather than to have sought him and killed him. Now, had Brown attacked Hays, or made efforts to take the advantage of him in a personal difficulty, in such a manner as to cause Hays to believe there was reasonable ground to suppose that Brown meant to do him great bodily harm; and Hays had, to prevent this, killed Brown, then the proof of previous threats by Brown against Hays, would have been proper and highly important testimony, if recently made and known to Hays. But such is not the case here. Brown is attacked by Hays and is slain; he does not seek the attack, nor does he attempt to defend himself until he sees the instrument of death in Hays' hand, raised to take his life. Previous threats are but words, and words are no justification or mitigation of murder. "Words of reproach, how grievous soever, are not a provocation sufficient to free the party killing from the guilt of murder; nor are indecent, provoking actions, or gestures expressive of contempt or reproach, without an assault upon the person." "And it ought to be remembered that in all other cases of homicide, upon slight provocation, if it may be reasonably collected from the weapon made use of, or from any other circumstance, that the party intended to kill or to do some great bodily harm, such homicide will be murder. The mischief done is irreparable, and the outrage is considered as flowing rather from brutal rage or diabolical malignity than from human frailty; and it is to human frailty, and to that alone, the law indulgeth in every case of felonious homicide." "But in these, and, indeed, in every other case of homicide, upon provocation, how great soever it be, if there is sufficient time for passion to subside, and for reason to interpose, such homicide will be murder."

“For, let it be observed, that in all possible cases, deliberate homicide, upon a principle of revenge, is murder. No man, under the protection of the law, is to be the avenger of his own wrongs.” “For he that deliberately seeketh the blood of another, upon a private quarrel, acteth in defiance of all law, human and divine, whatever his motive may be.” (Sir Michael Foster’s discourse II, of Homicide, ch. 5.^a

There are cases in which the threats of the deceased party have been given in evidence; also cases, in which such threats have been rejected. But in all such cases, where the threats have been admitted for the defence, they were recent, or continued down, so as to become nearly coeval with the killing, and were brought home to the knowledge of the party slaying. Meade’s case^b is one of those, where the threats were admitted in evidence. 1 Lewin’s C. C., 184, cited in Roscoe’s Crim. Ev., 772, 5th ed., 1854. In Meade’s case, the boatmen, of whom Law, the deceased, seems to have been one, attacked Meade, ducked him, and were in the act of throwing him into the sea, when he was rescued by the police. As Meade was going away, the boatmen threatened him, that they would come at night and pull his house down. In the middle of the night, Law, and a great number of persons came about Meade’s house, singing songs of menace, and using violent language. Meade, under an apprehension, as he alleged, that his life and property were in danger, fired a pistol, by which Law, one of the party, was killed. HOLROYD, J., among other things, said to the jury, “If you are of opinion that Meade was really attacked, and that Law and his party were on the point of breaking into the house, or likely to do so, and execute the threat of the day before, he was, perhaps, justified in firing as he did.” How widely different from this is the case now under our consideration. Meade had been rescued from the hands of a mob, and saved from being drowned. When he was going away, they threatened to pull his house down that night; the mob

^a Foster Cr. L., 290. ^b Post.

assembled at night around his house, menacing and using violent language. Now the acts of the mob, and the threats of the mob the day before, were proper evidence to explain their intentions the following night. The intentions of Law and his party were important matters. Were they likely to break into the house, or likely to execute their threats of the previous day? If so, then the shooting by Meade was justifiable. Their present conduct was properly to be understood from their past, and from their threats on the day previous. But suppose Meade had, four or five days afterwards, shot Law and killed him. Is it pretended that he could give in evidence the threats of the mob, when he was rescued by the police? Surely not. How, then, can Hays, who voluntarily and maliciously seeks the life of his victim, expect to justify or palliate his act, by giving evidence that his victim had before threatened to shoot him—threats, from all that appears to the contrary by the record, of long standing. In Rector's case,^c 19 Wend., 569, the counsel for the prisoner offered to prove that the house of the prisoner had been attacked on Saturday night, a week previous to the transaction, in which Robert Shepherd was killed by the prisoner, by several persons, and broken into, and the inmates very badly abused, and that they threatened to return some other night soon after, and break in again, if they were not admitted. The counsel avowed that this proof was offered to show that the *prisoner had reason to apprehend violence upon his house* at the time that the deceased and his companions came there, and that was his reason for using so much force as he did. It had been before proved, by a witness for the prisoner, that of those whom they had admitted as guests at the house of the prisoner, some were rioters. This testimony was rejected by the Court. In the Supreme Court, Justice COWEN, after commenting on Meade's case, says: "The case at bar presents the same circumstance of alarm, one step more remote—the assailants not being identi-

^c Post.

fied with the previous rioters. That, *per se*, however, would not so absolutely remove apprehension, that the killing could not be referred to it. The jury might have laid no stress upon the circumstance, but I think it should have been received, because we cannot say they would not. The lightness of a relevant circumstance is no argument for withholding it from the jury. In the prosecution of a crime so essentially the creature of intent as murder, every thing pertinent should be submitted to the jury, upon which they may infer an absence of malice." BRONSON, J., said: "It is important here to notice, with accuracy, what facts the prisoner proposed to prove, and the purpose for which the evidence was offered. The bill of exceptions states that an offer was made in the course of the trial, to prove that the house of the prisoner had been attacked on Saturday night previous to the transaction in question, by several persons, and broken into, and the inmates badly abused, and that they then threatened to return some other night, soon after, and break in again, if they were not admitted. This was the offer. The purpose for which it was made, as stated in the bill of exceptions, was to show that the prisoner had reason to apprehend violence upon his house, at the time that the deceased and his companions came there, and that was the reason for using so much force as he did." The Judge then said: "We are referred to Meade's case. There are some very important points of difference between that case and the one at bar." After commenting on the facts of Meade's case at some length, he continues: "In the case at bar, the pretended attack was not made the very next night after the threats of the rioters; a whole week had intervened. The attack was not made by a great number of persons. There were only three young men; and the knocking or kicking at the door for admittance, was probably nothing more than the prisoner had been accustomed to hear, without any apprehension for the safety of his person or property. But what is very material, there was no offer to prove that either of the

three young men was of the party which had committed the riot, or had any connection or acquaintance whatever with the rioters. Nor was there any offer to show that the prisoner supposed or believed, or had any reason to suspect or believe, that either of these three men had anything to do with the previous disturbance, or the threatened assault on his house. There was no suggestion that either the rioters or the young men were strangers to the prisoners. So far as the offer goes, he may have known very well that the deceased and his companions had nothing to do with the previous disturbance. Surely there is nothing in Meade's case to warrant the admission of such evidence as the prisoner proposed to give. Had the evidence been received, it would have furnished no just ground for the inference that the previous riot was at all in the mind of the prisoner, at the time he made the attack. It was a mere afterthought; an attempt to get up and distract the minds of the jury with a collateral question, foreign to the point in issue." After some further comments, the Judge said: "It seems impossible to maintain that the evidence was admissible. The facts, if proved, would not furnish even a colorable pretence for the attack on the deceased. Although it is never necessary that the evidence offered should be conclusive, it is always essential that it should have a direct tendency to establish the point in controversy. A different rule would lead to the most mischievous consequences in the trial by jury." NELSON, Chief Justice, said: "If I had been sitting upon the trial, I would have admitted the evidence, though I cannot but see, looking at the whole evidence, that it could not possibly have had much, if any, influence upon the minds of the jury. If the new trial turned upon it, I might hesitate before granting it." A new trial was granted, but not upon this point—principally upon another and different ground. In these cases, it will be observed that the prisoners, Meade and Rector, did not seek the persons killed. They were each in his own house; the mob came to them. They were at home.

They manifested no design nor disposition to bring on the attack. Such is not Hays' conduct. He saw Brown at the front of the store, and he prepared himself for taking his life. He does not even pretend that he was apprehensive of an attack from Brown. He does not avow, as Rector's counsel did, that he was apprehensive of an attack, and therefore used the weapon and the force he did, for the purpose of defending himself. I have not a shadow of doubt that such evidence would have been rejected by the court in which Meade and Rector were respectively tried, without hesitation.

In the case of *Monroe v. State of Georgia*,^a the facts were widely different from the facts in this case. There, the threats against the life of Monroe, coupled with the acts of Macon, were brought down to the time of the killing. The deceased, at his death, was armed with a Yauger and two pistols; he had been watching and seeking the opportunity to kill Monroe. He had created such a dread of losing life in Monroe's mind, that, although a physician, he was compelled to practice his profession by visiting his patients in the night time. Here, the threats by Macon against Monroe, and the acts of Macon of one continued hostile series down to the death, were important evidence to explain the killing on the part of Monroe. 5 Ga., 85, 135, 136. In the case from Georgia, Meade's case and Rector's case are quoted, and relied on as authority. This kind of evidence is permitted by the Court in Georgia, to show the reasonableness of the defendant's fears. In the case from Georgia, the testimony proved a continued series of threats, accompanied by acts of violence from the deceased towards the prisoner, commencing some months previously, and coming down to the time of the killing, and all showing a determination on the part of the deceased to take the life of Monroe, before the next ensuing term of one of the Courts of the county where the transaction happened. I repeat that the case at bar differs widely from the case of *Monroe*, just cited from 5 Georgia.

^a *Ante*, p. 442.

The evidence, in criminal and civil cases, depends upon the same rules. There is no difference; what may be received in one case may be received in the other, and what is rejected in one, ought to be rejected in the other. A fact may be established by the same evidence, whether it is to be followed by a criminal or a civil consequence. Russell on Crimes, book 6, ch. 1, p. 726. What is done in the heat of blood, the law attributes to the infirmity of human nature, and extenuates; what is done after time for reflection, proceeds from the wickedness of the heart, is revenge, and aggravates the deed. This is the law in civil cases, and evidence is admitted in pursuance thereof. 19 John., 319; 1 Mass., 12; 10 Conn., 459; 1 Bibb, 428; 3 Blackf., 219; 1 Bald., 58; 3 Har. & Johns., 162; 9 Mo., 529; 17 Mo., 534, 547.

The bill of exceptions in this case does not make the evidence of the threats even a pretence for the conduct of Hays. There is not the slightest ground to suppose he was laboring under any apprehensions of an attack from his victim. View the whole transaction with an impartial eye, and it becomes impossible to divest one's self of the strong impression that Hays maliciously and revengefully sought this controversy; prepared for it: he said he had sharpened his knife at home for the very purpose; he was anxious to have another blow at his victim. Can any one suppose that Hays had any apprehensions, any dread of an attack upon him by Brown? I imagine not. Why, then, offer this evidence of a loose threat, without any date? It was a mere afterthought, gotten up to distract the jury with a collateral matter utterly foreign to the issue on trial, and was properly rejected.

* * * * *

The instructions given for the State, as well as those given for the prisoner, and also those asked for by him and refused, are as follows: For the State: "1. If in the month of March, 1854, and in Howard county, the defendant wilfully, deliberately and premeditatedly, killed John W. Brown with a spade, the jury must find

him guilty of murder in the first degree. 2. If the killing was done as stated in the first instruction, it is no excuse that the defendant was intoxicated or under the influence of liquor at the time, and the killing, in such case, is still murder in the first degree; for it is a settled principle of law that drunkenness is no excuse for crime. 3. If the defendant with a spade in his hand, took a position near Brown and gradually approached him, and pushed him, for the purpose of inducing an altercation and getting a chance to kill him, and commenced raising his spade at the same time that Brown commenced drawing his pistol, and then struck him and killed him, he is guilty of murder in the first degree; and in such case it would be no defence, even if the evidence showed that Brown drew his pistol before the defendant commenced raising his spade; for the law will not permit a man thus to induce a provocation, and so take advantage of it. 4. In considering what defendant said after the fatal act, the jury must consider it altogether. He is entitled to the benefit of what he said for himself, if true, as the State is of everything he said against himself in any conversation proved by the State. What he said against himself, the law presumes to be true, because against himself; but what he said for himself the jury are not bound to believe, because said in a conversation proved by the State; they may believe or disbelieve it, as it is shown to be true or false by the evidence in the case. 5. They cannot acquit upon a mere possible doubt. It must be a reasonable doubt. 6. Although the jury may believe from the evidence that Brown was attempting to draw his pistol, or had it drawn at the time Hays struck, and that Hays' life or person was in imminent danger, yet, if they further believe that Hays intentionally brought on the difficulty for the purpose of killing Brown, he is still guilty of murder in the first degree. 7. The deliberation and premeditation necessary to constitute murder in the first degree, may be inferred from the circumstances connected with the killing; and if they existed for a moment, as well as an hour or a day before the

killing, it is sufficient. 8. If defendant, with a spade in his hand, took a position near Brown, and gradually approached him and pushed him, as testified to by Davis, and he did this for the purpose of inducing an altercation, as an excuse for killing him, and did kill him with the spade, then, although Brown drew his pistol at the time Hays raised his spade, as testified to by Davis, or even before Hays commenced raising his spade, he is guilty of murder in the first degree. 9. If Hays, with a spade in his hand, took a position near Brown, and gradually approached and pushed him in such a manner as to give Brown reasonable cause to apprehend a design on the part of Hays to do him some great personal injury, and to apprehend that there was imminent danger of such design being accomplished, then he had a right to draw his pistol, and even to kill Hays; and if Hays, under such circumstances, killed Brown, he cannot be acquitted. 10. If Hays killed Brown with a spade, the law presumes that it is murder, in the absence of proof to the contrary, and it devolves upon the defendant to show, from the evidence in the cause, to the reasonable satisfaction of the jury, that he was guilty of a less crime, or acted in self-defence." All of which instructions on the part of the State were given.

The defendant then asked the Court to instruct the jury as follows: "1. To find the defendant guilty of the charge in the indictment, the jury must believe, and that beyond a reasonable doubt, that the defendant killed John W. Brown feloniously, wilfully, deliberately and premeditatedly, and of his malice aforethought, having, before the act was done, deliberately formed the design to take the life of said Brown. 2. To find the defendant guilty of the charge in the indictment, the jury must believe, beyond a reasonable doubt, that the defendant, before he committed the act, formed a deliberate intention to kill Brown, and that there was deliberate malice in the act, or circumstances of cruelty and malice, carrying in them the plain indications of a depraved, wicked and malignant spirit. 3. The law presumes that the defend-

ant is innocent of the crime charged against him, and the jury must find him not guilty, unless they believe, beyond a reasonable doubt, that he is guilty; and if the jury have a reasonable doubt of his guilt, they are bound to find him not guilty. 4. To find the defendant guilty of the charge in the indictment, the jury must believe, beyond a reasonable doubt, that the defendant killed Brown with a formed design, with deliberation and premeditation, and that this deliberation and premeditation was formed by Hays before the blow was given. The fact that the killing was malicious and wilful, in the common law sense, is not sufficient. 5. That malice is a necessary ingredient to constitute the crime charged in the indictment, and the State must prove, to the satisfaction of the jury, beyond a reasonable doubt, the malicious intent with which the act was done; and if the jury have a reasonable doubt of the malicious intent with which the act was done, that doubt must weigh in favor of the prisoner, and, unless removed by the State, they must find him not guilty. 6. If the jury believe from the evidence, that the defendant killed Brown under circumstances where, by any statute, or by the common law, such killing is excusable or justifiable, then the jury shall return a general verdict of not guilty. 7. That, by the law of the State, the defendant was justifiable in taking the life of Brown, if done in the lawful defence of his person, and there was reasonable cause to apprehend, on the part of Brown, a design to do him some great personal injury, and there was immediate danger of such design being accomplished. 8. If the jury believe from the evidence, that at the time the defendant struck the deceased, he was in immediate danger of receiving some great injury from Brown, or thought himself so, then he had a right to kill him. 9. If the jury believe from the evidence, that the deceased drew a loaded revolver pistol on the defendant, with the design to shoot and kill him, or to do him some great personal injury, and there was immediate danger of such design being carried into execution, then the defendant had the right, in law, to

strike him in the lawful defence of his person. 10. To find the prisoner guilty of murder in the first degree, the jury must believe, and that beyond a reasonable doubt, that the prisoner killed John W. Brown feloniously, wilfully, deliberately, and of his malice aforethought, and that before the act was done, he had deliberately formed the design to take the life of Brown. 11. To find the defendant guilty of murder in the first degree, the jury must believe, and beyond a reasonable doubt, that the prisoner, before he committed the act, had formed a deliberate intention to kill Brown, and that there was a deliberate malice in the act, or that there were circumstances of cruelty and malignity, carrying in them the plain indication of a desperate, wicked and malignant spirit. 12. If the jury believe from the evidence, that Hays struck Brown with a spade, and that such stroke was in the lawful defence of his own person, and there was reasonable cause to apprehend a design on the part of Brown to do Hays great personal injury, and there was immediate danger of such design being accomplished, then they ought to find the defendant not guilty, although they may believe from the evidence, that said stroke caused the death of Brown. 13. If Hays, in the lawful defence of his own person, struck and killed Brown, who was at the time attempting to draw from his pocket a loaded pistol to shoot Hays, or do him some great personal injury, and there was immediate danger of such injury being accomplished, then Hays had a right to strike Brown in the necessary defence of himself, unless they believe that Hays, with a design of killing Brown, or doing him some great bodily injury, sought the difficulty and provoked Brown to draw his pistol. 14. If the jury find from the evidence, that Hays, in the lawful defence of himself, gave Brown the blow which caused his death, whilst Brown was attempting to draw a loaded pistol, and there was reasonable cause to apprehend a design on the part of Brown to shoot Hays, or do him some great personal injury, and there was immediate danger of such design being accomplished, then

Hays had a right to strike Brown in the necessary defence of himself, unless they believe that Hays, with a design of killing Brown, or doing him some great injury, sought the difficulty, and provoked Brown to draw his pistol. 15. If the jury entertain a reasonable doubt as to the existence of any fact necessary to constitute the guilt of the prisoner, they are bound to acquit him. 17. That, although the jury may believe the weight of evidence before them is against the innocence of the defendant; yet, unless they are satisfied of his guilt, beyond a reasonable doubt, they will find him not guilty. 17. That, in considering the declarations of the defendant, given in evidence, the jury will take into consideration the time and circumstances under which they were made, and also the condition of the defendant when made. 18. That, although drunkenness is no justification for the killing, yet the jury may take it into consideration in determining the intent of the defendant in doing the act."

Of these instructions, those numbered 1, 2, 4, 5, 6, 7, 8, 9, 11, 12 and 15 were refused by the Court, and those numbered 3, 10, 13, 14, 16, 17 and 18 were given.

There is no error, as we conceive, in any of the ten instructions given for the State. The counsel for the prisoner in their arguments before this Court, complained mostly of the eighth and tenth instructions. There is no error in the eighth instruction. The Court does not endorse the statement, made by the witness, Davis, of the circumstances attending the killing, nor does the Court mis-state the evidence of the witness, Davis, but merely directs the jury to the law, if the facts be as Davis has stated them. This instruction is unobjectionable. It laid down the law properly, and it does not tend to mislead the jury. The tenth instruction is also literally correct ; nor can we see how the jury could be misled by it. If Hays killed Brown with a spade, the law presumes it is murder in the absence of proof to the contrary, and it devolves upon the defendant to show from the evidence in the cause, to the reasonable satis-

faction of the jury, that he was guilty of a less crime, or acted in self-defence. Now this is literally correct. The law does presume such killing murder. The Court did not fix the degree of murder; it did not say in the first nor second degree; nor is there any reason to suppose that the jury were misled by this instruction. The counsel thinks that as the crime of murder in the first degree had been mentioned all along before by the Court, that by saying *murder*, without mentioning any degree, the jury would believe the Court meant murder in the first degree; but this is a *non sequitur*. This is not a fair interpretation of the instruction. Although with us the presumption under our statute from such a killing would be murder in the second degree, in accordance with the decisions of the Pennsylvania and Virginia courts, where similar statutes exist, yet, it is nevertheless murder. In the case of the State against Dunn, 18 Mo., 424, this Court said, in speaking of the statute of Pennsylvania defining murder in the first degree, of which our statute is a transcript: "Under that statute it has been held, that, unless the circumstances of malice are proved, the law will presume the unlawful killing murder of the second degree. Under the act, the unlawful killing is presumed to be murder, but not murder in the first degree. Whenever it appears from the whole evidence, that the crime was at the moment deliberately or intentionally executed, the killing is murder in the first degree; as if one, without uttering a word, should strike another on the head with an ax, this would be deemed premeditated violence within our act. It will constitute the offence, if the circumstances of wilfulness and deliberation were proven, although they arose and were generated at the period of the transaction. If the party killing had time to think, and did intend to kill for a minute as well as for an hour or a day, it is a deliberate, wilful and premeditated killing, constituting murder in the first degree. So that, under our statute, there is no foundation for the notion that the crime must have been preconceived sometime before its perpetration." This

instruction, then, being taken in connection with the tenth instruction asked for by the prisoner, and given by the Court, could not possibly have misled the jury; but the two put the law of the case properly before the jury, and as favorably for the prisoner as he had a right to ask.

In looking over the record, we find that the 3d, 10th, 13th, 14th, 17th and 18th instructions asked for by the defendant were given to the jury; and when we compare these instructions, with those given for the State, and then look into the statement of facts in evidence, we cannot but see that the law of the case was as fairly and favorably for the defendant before the jury, as he had a right to ask and demand from the Court.

The counsel for the prisoner in asking some of his instructions, evidently overlooked the law concerning malice. I shall not notice each instruction refused. It is not important to do so. If we find the law of the case fairly and plainly set before the jury, although some other instructions which were refused might lawfully have been given, still we will not reverse for that. This is the general course of proceeding in this Court. But as to the law of malice, I deem it important to offer a few observations. Malice, in its proper or legal sense, is different from that sense which it bears in common speech. In common acceptation, it signifies desire of revenge, or a settled anger against a particular person. But this is not the legal sense. Lord HOLT says, upon this subject: "Some have been led into mistakes by not well considering what the passion of malice is; they have construed it to be a rancor of mind, lodged in the person killing for some considerable time before the commission of the fact, which is a mistake, arising from the not well distinguishing between *hatred* and *malice*. *Envy*, *hatred* and *malice*, are three distinct passions of the mind." Kel., 127 Amongst us, malice is a term of law importing directly wickedness, and excluding a just cause or excuse. Where the question of malice has arisen, in case of homicide, the matter for consideration

has been whether the act was done with or without just cause or excuse. Malice, in its legal sense, denotes a wrongful act, done intentionally, without just cause or excuse. It is not, as in ordinary speech, only an expression of hatred and ill will to an individual, but means any wicked or mischievous intention of the mind. Thus, in the crime of murder, which is always stated in the indictment to be committed with malice aforethought, it is not necessary, to support such indictment, to show that the prisoner had any enmity to the deceased; nor would proof of absence of ill-will furnish the accused any defence, when it is proved that the act of killing was intentional, and done without any justifiable cause. *Rex v. Harvey*, 2 Barn. & Cres., 268; *McPherson v. Daniels*, 10 Barn. & Cres., 272; *Archb. Crim. Pract.*, 213. Such is the definition of malice by the English courts. Mr. Justice BAYLEY, in *Bromage v. Prosser*, 4 Barn. & Cres., 255, said: "Malice, in common acceptation, means ill-will against a person; but, in its legal sense, means a wrongful act, done intentionally, without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it of malice, because I do it intentionally, and without just cause or excuse. If I maim cattle without knowing whose they are; if I poison a fishery, without knowing the owner, I do it of malice, because it is a wrongful act, and done intentionally."

In *Commonwealth v. York*, 9 Met., 93, Chief Justice SHAW lays down the same doctrine. "A sane man is a voluntary agent, acting upon motives, and must be presumed to contemplate and intend the necessary, natural and probable consequences of his own acts. If, therefore, one voluntarily or wilfully does an act which has a direct tendency to destroy another's life, the natural and necessary conclusion from the act is, that he intended so to destroy such person's life. So, if the direct tendency of the wilful act is to do another some great bodily harm, and death, in fact, follows as a natural and probable consequence of the act, it is presumed that he intended such consequence, and he must stand legally

responsible for it. So, where a dangerous and deadly weapon is used with violence upon the person of another, as this has a direct tendency to destroy life, or do some great bodily harm to the person assailed, the intention to take life or do him some great bodily harm, is a necessary conclusion from the act." "But, however suddenly any act is done, the intent to do it precedes the doing of it, and the act is done in pursuance of the intent and formed design. However short the interval, the intent necessarily precedes. This is manifest from the ordinary case of a blow given with a deadly weapon, immediately upon the words of provocation. Words, however aggravating, not being considered a sufficient provocation to extenuate the offence to manslaughter, it is universally held murder—an act done with malice prepense; and it is not the less preconceived, because the act immediately followed the guilty intent."

In looking over the whole case, the facts plainly show a most deliberate and wilful killing—plainly show a previous state of bitter hatred toward the deceased by the prisoner—plainly show a voluntary and unnecessary attack, with a deadly weapon, without provocation or excuse; and that the homicide is a result of a violent and cruel act, instigated by a morbid desire for revenge, the offspring of a heart regardless of social duty, and fatally bent on mischief. The trial has been fairly conducted; the law properly laid down to the jury; the evidence given without objection; the grounds for reversal urged before us unsubstantial and unsatisfactory? There remains nothing further than for the law to take its course.

Judge LEONARD concurring, the judgment is affirmed; Judge SCOTT, dissenting.

Judgment affirmed.

NOTE.—Upon the question that a person cannot provoke a difficulty and slay his adversary therein, and then be heard to urge that the killing was in self-defence, see Selfridge's case, *ante*, pp. 24, 25; Neeley's case, *ante*, p. 96; Stewart's case, *ante*, p. 191; Hill's case, *ante*, p. 199; Evans' case, *ante*, p. 329; Adams' case, *ante*, p. 208; note I. to Stoffer's case,

ante, p. 220. Upon the exception to this rule, which is, that a person having thus placed himself in the wrong, may place himself in the right, and re-acquire his full right of defence by fairly retreating, or by fairly endeavoring to withdraw from the contest, see Stoffer's case, *ante*, p. 213, and note II. to the same, beginning on page 227.

There is still another way of stating the principle involved in the principal case, and that is, that whatever degree of force the violence of the defendant rendered it necessary for the deceased to use in his defence, could not in law constitute such a provocation as would mitigate the act of killing to manslaughter, nor such a justification as would reduce it to excusable homicide. For a discussion of the question in this point of view, see Baker's case, *ante*, p. 75, and Hinton's case, *ante*, p. 83, and note to the same, pp. 90, 91.

A very apt illustration of the same principle will be found in *Lingo v. The State*, 29 Ga., 470, 484. It would not be profitable to consume space in detailing the facts of this homicide at length, as they are fairly stated, though in a general way, in the following extract from the opinion of the Supreme Court of Georgia, delivered by STEPHENS, J.: * * * * *

"It is said the verdict was contrary to law and evidence, because the killing in this case was not murder. We are constrained to say that it *was* murder—long planned and deliberately perpetrated murder. Lingo had declared he would have Duncan's heart's blood. At the time of the killing, he commenced a quarrel and rushed on him; Duncan retreated and warned him not to pursue. He did pursue, with his hands behind him, and Duncan still retreated, and warned him several times that he would shoot him if he persisted in the pursuit. He did persist, and Duncan did shoot. The shot took no effect and Duncan then fled, and Lingo then exclaimed, 'Now, damn you, I've got you.' He then pursued until he overtook Duncan, and plunged a spear into his heart. Most literally and fearfully did he accomplish his threat. Where is anything to justify this act, or to reduce it one shade below the crime of murder? It was admitted in the argument that there was no provocation for the commencement of the attack, but it was suggested that the killing was induced by a provocation arising in the conflict; that Duncan's shooting at him was a provocation; that he did not begin the assault with an intent to kill, but only to whip, and that the intent to kill did not arise till the shooting had furnished an excuse for it. The fallacy in this argument lies in assuming that Duncan's shooting was any provocation at all. It was justifiable shooting. Whether Lingo had, before that, intended to kill or not, he had at least, tried to make Duncan *believe* that such was his intention; for he declared afterwards that he held his hands behind him, to make Duncan believe he had a pistol. There was certainly ground to excite the fears of a reasonable man, and this was enough to justify Duncan in shooting. Lingo had himself rendered the shooting necessary to Duncan's self-defence; he had *intentionally* put himself in an attitude, which forced Duncan to believe that his life was in danger. All that Duncan did was entirely justifiable, and could not, for that reason, be any *provocation*. But the case does not rest here. His own declaration, above quoted, shows that his intent to kill had been formed *before* Duncan shot. For what reason did he wish to make Duncan believe he had a pistol? It was in the

expectation that he would shoot, and in the hope of destroying his aim, by putting him under terror. He proceeded with great nerve and skill. He counted upon his antagonist missing his aim, and being then in his power. He had the nerve to take the hazard, and the skill to render it harmless to himself. But why take this hazard? It was to get his victim in his power; and the use which he intended to make of his power, is best shown by the use he did make of it."

THE STATE v. SLOAN.

[47 Mo., 604.]

Supreme Court of Missouri. St. Louis, March Term, 1871.

DAVID WAGNER,
PHILEMON BLISS,
WARREN CURRIER, } *Judges.*

**ADMISSIBILITY OF EVIDENCE OF COMMUNICATED THREATS IN TRIALS FOR
HOMICIDE—DECLARATIONS OF DECEASED AFTER THE KILLING—ACTING
UPON APPEARANCES OF DANGER.**

1. On the trial of an indictment for murder, where it appeared that the deceased began making threats that he would kill the defendant some weeks before, and that such threats were communicated to the defendant, and that the deceased continued to make them within an hour of the killing, it was error to reject evidence of all threats made more than three days before the killing, as being too stale and remote.

2. The question, as to what lapse of time between the threats and the killing will be sufficient to exclude evidence of the threats, discussed and authorities reviewed. And the rule appears to be that where the testimony proves a continued series of threats, extending back for several weeks or months, if such threats were communicated to the defendant, they will not be excluded on the ground of being too stale or remote. [Citing and comparing *Monroe v. State*, *ante*, p. 442. Also citing and distinguishing *State v. Jackson*, 17 Mo., 544, and *State v. Hays*, *ante*, last case. Acc. *Robert Jackson's case*, *ante*, p. 476; *Little's case*, *ante*, p. 487; *Dupree v. State*, 33 Ala., 300; *Howell v. State*, in note to *Monroe's case*, *ante*, p. 469; *Pridgen's case*, *ante*, p. 416; and others.]

3. Threats made by the deceased against the defendant shortly before the killing, the deceased being at the time armed to carry out such threats, are admissible as a part of the *res gestæ*. [Acc. *Campbell's case*, *ante*, p. 282; *Little's case*, *ante*, p. 487; *Goodrich's case*, *post*; *Holler's case*, *post*;

Keener's case, *post*; Stokes' case, *post*; Cornelius v. Com., 15 B. Monr., 539; Pitman's case, *post*; Howell's case, *ante*, p. 469, note to Monroe's case; Riddle v. Brown, *post*, note to Goodrich's case; Scoggins' case, *post*; Arnold's case, *post*, in note to Scoggins' case, *post*. Contra, Powell v. State, *post*; Chambers v. Porter, *post*; Atkins v. The State, *post*, in note to Pitman's case; Coker's case, *Ib.*; Lingo v. State, *post*, note to Keener's case; Hoyer v. State, *post*, note to Keener's case; Newcomb v. The State, 37 Miss., 400; People v. Henderson, 28 Cal., 465.]

4. And this is especially so, where such threats form part of a continuous chain of antecedent threats, in which case they are all admissible in evidence together. [Acc. Cornelius v. Com., 15 B. Monr., 539; Holler's case, *post*.]

5. Declarations of the deceased, made immediately after the killing, that he, deceased, provoked the assault and would have killed the defendant if his pistol had not hung fire, are admissible as part of the *res gestæ*. [Citing Brownell v. The Pacific R. R. Co., 47 Mo., 239; and distinguishing McMullan v. State, 13 Mo., 30. [Acc. Hurd's case, *post*. And see the cases cited by counsel.]

6. Where a person apprehends that another is about to do him great bodily harm, and there is reasonable ground for believing the danger imminent that such design will be accomplished, he may safely act upon appearances, and even kill the assailant, if that be necessary, to avoid the apprehended danger; and the killing will be justifiable, although it may afterwards turn out that the appearances were false, and that there was, in fact, neither design to do him serious injury, nor danger that it would be done. He must decide at his peril, upon the force of the circumstances in which he is placed, for that is a matter which will be subject to judicial review; but he will not act at his peril of making *that* guilt, if appearances prove false, which would be innocence, had they proven true. [Citing Shorter v. People, *ante*, p. 256; Campbell v. People, *ante*, p. 282. Acc. Pond's case, *post*; Selfridge's case, *ante*, p. 18; Sullivan's case, *ante*, p. 65; Logue's case, *ante*, p. 269; Harris' case, *ante*, p. 276; Schnier's case, *ante*, p. 285; Neeley's case, *ante*, p. 101; John Doe's case, *ante*, p. 62; Robert Jackson's case, *ante*, p. 476; Rapp's case, *ante*, p. 293; Meredith's case, *ante*, p. 298; Dyson's case, *ante*, p. 304; Cotton's case, *ante*, p. 210; Wesley's case, *ante*, p. 319; Evans' case, *ante*, p. 329; and the cases cited in the note to Grainger's case, *ante*, p. 242.]

The grounds on which this case was decided are fully stated in the opinion, except that the tenth instruction given for the State is not there set out. This was as follows:

"The law of self-defence is, emphatically, the law of necessity, to which a party may have recourse under certain circumstances, to prevent any reasonably apprehended great personal injury which he may have reasonable ground to believe is about to fall upon him. If

you believe that the defendant had reasonable cause to apprehend a design on the part of the deceased to commit a felony on the defendant, or to do him some great personal injury, and that there was reasonable cause to apprehend immediate danger of such design being carried out, and that he shot and killed the deceased to prevent the accomplishment of such apprehended design, then the killing is justified upon the ground of self-defence, and you should acquit. It is not necessary to this defence that the danger should have been real or actual, or that the danger should have been impending, and immediately about to fall. If you believe that defendant had reasonable cause to believe these facts, and he shot under these circumstances, as he believed, to prevent such expected harm, then you should acquit. But, before you can acquit on the ground of self-defence, you ought to believe that defendant's cause of apprehension was reasonable. Whether the facts constituting such reasonable cause have been established before you by the evidence, you are to determine; and unless the facts constituting such reasonable cause have been established by the evidence in the case, you cannot acquit on the ground of self-defence, even though you may believe defendant really thought his cause of apprehension reasonable.

S. M. Chapman, for plaintiff in error.

I. It was error to exclude evidence of Moore's threats and conduct before the affray, and in holding that all threats and demonstrations made by him, more than three days before the affray, were too stale to be given in evidence, although communicated before the shooting; and that all such as had not been communicated were inadmissible, however recent. *Campbell v. People*,^a 16 Ill., 17; *Dukes v. State*, 11 Ind., 557; *Cornelius v. Commonwealth*, 15 B. Monroe, 539; *Howell v. State*,^b 5 Ga. 54-5; *Keener v. State*,^c 18 Ga., 224-9; *Lingo v. State*, 29 Ga., 484; *Stewart v. State*,^d 19 Ohio, 306; *Pitman v.*

^a *Ante*, p. 282. ^b *Ante*, p. 469, note to Monroe's case.

^c *Post*. ^d *Ante*, p. 191.

State,^{*} 22 Ark., 356, and cases cited; Dupree v. State, 33 Ala., 380; Monroe v. State,[†] 5 Ga., 85, 121; Roscoe's Crim. Ev., 6th ed., 710.

II. Defendant had tried to avoid his adversary, but all to no purpose; and when he saw the danger imminent, he was justified in acting more promptly in his defence, and upon less demonstrations of hostility, than though his fears had not been aroused by Moore's threats and prior conduct. State v. Hicks, 27 Mo., 588; People v. Rector,[‡] 19 Wend., 569; Selfridge's trial,[§] 160; Philips v. Commonwealth,[¶] 2 Duvall, 328; Pattison v. People, 46 Barb., 625; Grainger v. State,^{||} 5 Yerg., 459; 1 Bish. Crim. Law, § 384; Young v. Commonwealth,[Ⓜ] 6 W. P. D. Bush, 312; Campbell v. People, *supra*; 2 Whart. Crim. Law, 4th ed., § 1027, note.

III. The Court should have admitted evidence of Moore's declarations to his surgeons, while engaged in extracting the ball and dressing the wound, made immediately after the affray, "that Sloan was not in fault, that he had drawn on the difficulty by attacking him," as part of the *res gestæ*. Commonwealth v. McPike, 3 Cush., Mass., 181; King v. Foster, 6 Car. and Pay., 325; Aveson v. Kinnaird, 6 East., 197; Travelers' Ins. Co. v. Mosley, 8 Wall., 397; Rawson v. Haigh, 2 Bing., 104; Starkie's Ev., Sharswood's ed., 89; Durant v. People, 13 Mich., 351; Marr v. Hill, 10 Mo., 320; Wadlow v. Perryman, 27 Mo., 279; Hanover R. R. Co. v. Coyle, 55 Penn., 396.

Leonard, for defendant in error.

WAGNER, J., delivered the opinion of the Court:

The defendant was indicted in the Circuit Court of Dunklin county, for the murder of one Charles A. Moore. The indictment was in the usual form for murder in the first degree, and a change of venue having been awarded to Cape Girardeau county, a trial was there had, and he was convicted of manslaughter in the first degree.

^{*} *Post.* [†] *Ante*, p. 442. [‡] *Post.* [§] *Ante*, p. 18. [¶] *Ante*, p. 383. ^{||} *Ante* p. 238. [Ⓜ] *Ante*, p. 400, note to Bohannon's case.

The exclusion of evidence offered by the defendant, the giving and refusing of instructions, and the finding of the jury, are the matters complained of.

The evidence shows that Moore, the deceased, entertained the greatest ill-feeling toward the defendant, whom he accused of slandering him; that he had made threats on various occasions that he would kill him: that he commenced to make these threats some weeks before, and continued to make them to within less than an hour of being shot, when he stated, while belting on his pistol and going in the direction of the defendant, that he "was going to kill George Sloan." At the time of the killing, the defendant had just come to town, and Moore immediately sought him out, and got into an altercation with him; the defendant started to leave, and Moore followed him, with his revolver buckled on his person; defendant then turned round, saying to Moore, "Don't follow me," and immediately fired the shot, from the effects of which Moore died in a few days thereafter.

The Court rejected all evidence of threats made by the deceased more than three days previous to the shooting, as being too stale and remote, and also refused to admit in evidence those threats which had been made just prior to the killing, and which had not at that time been communicated to the defendant. What length of time must elapse after threats are made, and under what circumstances they are to be received in evidence, is not very definitely fixed, or clearly settled. In *The State v. Jackson*, 17 Mo., 544, it was held that evidence of threats was not admissible, if sufficient time had elapsed for the blood to cool. But that case is so entirely different in its features from this, that it can be regarded of very little authority.¹

¹ The part of the opinion in *Jackson's case*, 17 Mo., 544, here referred to, is as follows: RYLAND, J.: * * * "It seems that Jackson and his wife had separated, and that Millsaps, [the prosecutor, it being an indictment for assault with intent to kill], had carried a pistol some months before, and threatened, if Jackson came across his way, or laid his hands on him, he would shoot him. But the evidence offered had no tendency to

In the case of *State v. Hays*,^m 23 Mo., 287, it appeared from all the evidence, that the prisoner was the aggressor, bringing the threats down to the immediate cause of the shooting. If there was time for the blood to cool—for the passion to subside, these remarks and threats will not mitigate." In support of this conclusion, the learned Judge cites *Coxe v. Whitney*, 9 Mo., 531; and *Collins v. Todd*, 17 Mo., 537. These cases decide that in actions for damage for assault and battery, no matter of provocation, such as abusive language or a libellous publication, can be received in evidence *in mitigation of damages*, unless so recent as to create a fair presumption that the violence was done under the influence of the passion excited by it.

We presume that no other case of homicide or assault to kill can be found where the grounds on which threats are admitted or excluded are confused with the doctrine of cooling time, unless the language of the Court, in *Hays' case*, *ante*, p. 505, can be so understood. It is a familiar principle that no threats, however violent, and no words or writings of whatever character, will justify or wholly excuse an assault. *Selfridge's case*, *ante*, p. 24. Much less can any threats, or other words or writings, afford such a legal provocation as will reduce a killing from murder to manslaughter. *Hill's case*, *ante*, p. 206; *Williams' case*, *ante*, p. 349; *State v. Butler*, 8 Cal., 435; *Hawkins v. State*, 25 Ga., 207; *Ray v. State*, 15 Ga., 244. Hence, the doctrine of *cooling time* can have no application to a case of threats merely; nor can the period of time within which passion should subside, or the blood cool, furnish any criterion in determining how recent, or how remote in point of time, threats must have been, in order to permit evidence of them to be introduced. Because the object of introducing evidence of threats is either—

1. Where the threats were previously communicated, to show that the accused had reason to believe that the assailant at that time intended to kill him or do him some great bodily harm; or, as it is sometimes expressed, to show the reasonableness of the defendant's fears. *Scoggins' case*, *post*; *Keener's case*, *post*; *Monroe's case*, *ante*, p. 442.

2. Where the threats were not communicated, to show the design with which the assailant advanced to the encounter; or, to throw light upon doubtful transactions; or, where the proof is obscure, and the motives of the defendant unaccountable, to negative the legal presumption of malice; or, to corroborate evidence of communicated threats which has already been admitted. *Campbell's case*, *ante*, p. 282; *Little's case*, *ante*, p. 487; *Goodrich's case*, *post*; *Arnold's case*, *post*; *Scoggins' case*, *post*; *Stokes' case*, *post*; *Cornelius v. Commonwealth*, 15 B. Monr., 539; *Howell v. State*, 5 Ga., 48.

We have found no other case in which the doctrine of threats has been mentioned in connection with that of manslaughter; except such as distinctly repudiate the idea, that threats *per se* can afford any mitigation of the crime of murder; such as *Dyson's case*, *ante*, p. 310, and *Lander's case*, *ante*, p. 366.

The theory of homicide in self-defence, and the theory of voluntary manslaughter, are entirely disconnected and distinct. In the former case, the killing may or may not be *intentional*; but if intentional, the law justi-

ser, and had sought the difficulty in which the deceased was killed. This Court refused to reverse the judgment

fles or excuses it on the ground that it was *necessary* to save the slayer's life; or, if unintentional, that it unfortunately happened, while the defendant was exerting no more force than was necessary in his lawful defence. In voluntary manslaughter, the killing is *intentional*, but not *necessary*; the law neither justifies nor excuses it, but out of regard for the frailty of human nature, *mitigates the punishment*, indulging the supposition that the killing, though intentional, was not done out of *malice*;—that is, out of *wickedness*, or out of a heart lost to considerations of social duty, but out of *passion or anger*, superinduced by strong *provocation*.

There is one case, however, that is not altogether unlike Jackson's case, in the particular here considered. We refer to *Hawkins v. The State*, 25 Ga., 207. The language which we regard as peculiar we have italicized. It is true that it reads like an unhappy confusion of the doctrine of threats with that of cooling time; but at most, it cannot be that the learned Judge could have intended more than that the threat of killing, made by the deceased, might, if it had been made very soon after the fight, and if it had been heard by defendant, have operated as a continuance of the provocation, if there had been any legal provocation, given by the blows in the combat.

The facts of this case were as follows: Hawkins, the defendant, and Scott, the deceased, were gambling in a crib in a yard, when an altercation ensued, which ended in a fight; Hawkins got out of the crib, and gathered up some rocks or brickbats; Scott told Hawkins to lay down the rocks, and he would come out; Hawkins laid them down, but Scott remained in the crib; Hawkins then took a stick and went up to the door of the crib and struck at Scott, and "punched" at Scott with the stick through the cracks of the crib: he then took some rocks and threw them at Scott in the crib. After throwing the rocks, he left the yard and went to the house, some two hundred and fifty yards off. Scott said that Hawkins was too mean to live in the country, and that he intended to kill him. Just as Scott said this, Hawkins was coming towards him, and was about twenty-four steps from him; Hawkins had a horse-pistol in his hand, and when he came within about ten feet of Scott, he raised it and shot him; the shot took effect in the left breast of Scott, who fell dead, moving only three or four steps. The witnesses stated their belief that Hawkins was sufficiently near to Scott to hear the threat of Scott to kill him.

The Court, among other things, charged the jury that if they should find, "that between the provocation given and the killing, there was sufficient time for the voice of reason and humanity to have resumed her sway, whether in this case she had done so or not, the killing was murder, and not manslaughter." To which charge the defendant's counsel excepted.

The jury found the defendant guilty of murder. LUMPKIN, J., in pronouncing the opinion of the Court, said: "As to the charge of the Court, it was in the terms and language of the Code. Cobb's Dig., 4 Div., § 7. Provocation by threats will not be sufficient to free the slayer from the guilt of murder. *And if sufficient time had elapsed for reason to resume her sway, the killing shall be attributed to deliberate revenge, and punished as murder.*

of conviction for murder, because the Court below rejected evidence of threats made by the deceased against

Here the menaces were evidently made after Hawkins had determined to kill Scott, for they were made after he returned from his house with deadly weapons; and it is very doubtful whether the words of Scott were heard at all by Hawkins. They were addressed to the witness, and not to Hawkins. Russ., Cr. 433, 442, and citations; Whart. Crim. Law, 375, 377, [old edition]; Rosc. Crim. Ev., 724, 729, 730, 731. But what provocation was given in this case to justify the uncontrollable passion relied on in mitigation of the homicide? Hawkins seemed to have got the best of the fight in the crib; he continued to assault Scott after he came out; he left him in the crib, hastened home, a distance of two hundred and fifty yards, procured his pistols, returns and executes his murderous purpose, evidently formed before he left Scott. It will never do to tolerate such a plea—I had almost said, such a pretence;—no, never! Ray v. The State, 15 Ga., 244, 245."

This last named case does not deal with the question of threats, but as its conclusion on the subject of provocation is somewhat peculiar, we shall quote so much of it as relates to that subject. Extract from the opinion of the Court, delivered by STARNES, J.: * * * The motion for a new trial was placed upon the ground that the verdict was contrary to the evidence; that there was no evidence of malice, express or implied, in this homicide; and that the jury should not have found the prisoner guilty of a higher crime than voluntary manslaughter.

It is not pretended that there was any evidence of *express* malice found in the record; but the case is put entirely upon the evidence of *implied* malice, which, it is said, appears there.

Our Penal Code declares that "malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart."

Let us enquire, then, 1. Was there no considerable provocation here? 2. Did the circumstances of the killing show an abandoned and malignant heart?

We learn from the record, that at the time when this difficulty commenced, a buggy of the prisoner, or one that he had in charge, stood before the door of a grocery in the town of Perry, in which the prisoner was; that the decedent recklessly, (as there was abundance of room for him to have avoided it), struck against this buggy, with the wheel of a wagon which he was driving, and did some damage to it; that information was communicated immediately to the prisoner, who instantly left the house, hastened rapidly after decedent, who was moving on with his team, and overtook him, after going some one hundred and fifty yards.

And now to answer the question which we submit, let us look to the strongest testimony against the prisoner, for what ensued, namely: that of Jesse Cooper, the principal witness for the State. What do we learn from *him* of the provocation? He testifies that the prisoner ran up, as we have stated, seized one of the decedent's horses; stopped the wagon; in his passion, cursed decedent for breaking his buggy, and demanded payment for it. Was his passion appeased by what decedent said or did? According to this witness, the latter said that if he had broken the buggy, he had

the prisoner, the record not showing whether the threats were recent or of long standing. Of the propriety and

done it accidentally, and would pay for it. But did he say this in a way which was calculated to soothe or to irritate Ray still further? That the reply must have been in manner and spirit of the latter character, is probable, from the still more angry reply of Ray, and his threat to whip him if he did not pay "right then." It is also probable from decedent's intoxication, from his recklessness in driving against the buggy, and from his subsequent readiness to quarrel and fight; for he instantly said that "if that, (a fight,) was what the prisoner was up to, he would have a hand with him." Without words of regret on account of what he had done, on account of the first wrong in the transaction; at all events, without words of this sort expressed, in a way which might conciliate, he manifested a quarrelsome and pugnacious spirit—threatened the employment of a weapon, or something like it; for he said, "he had a wagon-hammer he could use;" (this the witness admitted upon cross-examination); got off his horse, went, as the witness supposes, to get this hammer, but failing to get it, moved towards the prisoner; (for on the cross-examination, the witness says: "Taylor might have been approaching him, (prisoner); he thought so at the time, and he thinks so now,") when he received the prisoner's blows. In the meantime, still smarting under a sense of the injury done him by the breaking of his buggy—incensed by the decedent's manner, as prisoner, no doubt, thought, of persisting in injustice—irritated and maddened by the offers of the latter to fight, and his movements to procure a dangerous implement for that purpose, the prisoner ran rapidly to a board, which lay near, seized it, rushed upon the decedent, and struck the fatal blows.

We do not hesitate to say, that such circumstances show a considerable—a very exasperating provocation. They present a stronger case of provocation, in our opinion, than that which appears in Lanure's case, 1 East P. C., 283, where one violently and with insolence, whipped the horse of another out of his way, and the rider alighted, and immediately, in the fight which ensued, killed the assailant. This was held to be manslaughter on account of the provocation.

To this testimony of Cooper, let us add the evidence of Franks, going to show decedent's efforts to get the hammer; the evidence that decedent must have been meeting prisoner afterwards, from the fact that the board picked up by the latter was near the store, and that decedent was going towards the store when Ray met him; the testimony of Dr. Holt, that the prisoner, from his position, could not have known whether or not decedent had gotten the hammer, (which leaves the inference that he may have supposed that decedent had it); the statements of the same witness, that "they were both meeting each other;" that he (decedent) "proceeded to meet Ray," etc.; that "one seemed to be as anxious for the fight as the other," etc.

These facts greatly strengthen the view we have taken, and, to our minds, make the conclusion very plain, that there was considerable provocation on the part of the decedent; that there was great heat of blood between the parties, and something of mutual intention to fight.

In forming this opinion we have not been unmindful, that, according to

justice of the decision upon the facts as developed in that case, there can be no doubt. At what time the threats were made, did not appear, and the murdered man was not trying to execute his threats, or commit any offence, when the prisoner met and killed him. A threat antecedently made, would, of course, furnish no justification or palliation for a homicide under such circumstances. The books contain examples in which the threats of the deceased party have been given in evidence, and there are also cases in which such threats have been rejected. But, where such threats have been received, they were generally recent, or continued down, so as to become very nearly coeval with the killing, and were brought home to the knowledge of the party slaying. See Lewin's C. C., 184; Rosc. Crim. Ev., 772; Rector's case, 19 Wend., 569. But the Judge who delivered the opinion of the Court in Hays' case, distinguishes it from that class of cases where the threats are made and continued down to the time of the killing. Thus, in speaking of the case of *Monroe v. The State*,^a 5 Ga., 85, 135, 136, he says: "In the case of *Monroe v. the State of Georgia*, the facts were widely different from the facts in this case. There, the threats against the life of Monroe, coupled with the acts of Macon, were brought down to the time of killing. The deceased, at his death, was armed with a Yauger and two pistols; he had been watching and seeking the opportunity to kill Monroe. He had created such a dread of losing life in Monroe's mind, that, although a physician, he was compelled to practice his profession

law, the provocation which reduces such a homicide to voluntary manslaughter, must be one that involves some assault by the party killed upon the person killing.

We think such assault may be found in this case, in the intention of the decedent to resort to violence, when it was unnecessary; is to be found in the evidence, which shows a mutual design to fight, and in the fact that the decedent was approaching the prisoner in furtherance of this design.

The Court then proceed to consider whether the evidence affords proof of implied malice, and having also concluded this point in the negative, reverse the judgment, and award a new trial.

See also, note d. to Keener's case, *post*.

^a *Ante*, last case. ^b *Ante*, p. 442.

by visiting his patients in the night time. Here, the threats by Macon against Monroe, and the acts of Macon, of one continued hostile series down to the death, were important evidence to explain the killing on the part of Monroe. In the case from Georgia, Meade's case and Rector's case are quoted and relied on as authority. This kind of evidence is permitted by the court in Georgia, to show the reasonableness of the defendant's fears. In the case from Georgia, the testimony proved a continued series of threats, accompanied by acts of violence from the deceased towards the prisoner, commencing some months previously, and coming down to the time of killing, and all showing a determination on the part of the deceased to take the life of Monroe before the next ensuing term of one of the courts of the county where the transaction happened. I repeat, that the case at bar differs widely from the case of Monroe, just cited from 5 Georgia."

The facts in the case from Georgia are almost identical with the case we are now considering. The deceased, Moore, at a party, had sought a personal difficulty with Sloan, which Sloan shunned. Two or three days before the shooting, and again on the day before, he threatened to kill Sloan the "first time he saw him;" that, on the occasion last referred to, he stated that he "intended to kill him the first time he saw him, as he was nobody but a God-damned Yankee, and should not associate with white folks," and this was communicated to Sloan before the affray. It appears, also, that when the defendant was in the store, Moore come to the door with a revolver, looked in, and requested the proprietor to shut up his store, as he "expected that he and Sloan would have a difficulty, and he did not wish to have it in his house." This remark of Moore the Court excluded, because it was not communicated to the defendant. In an analogous case in the State of Illinois, this same question arose, and the court there held that the evidence was admissible. The Court remarks: "Upon the trial, the defence offered to prove that on the day, and at other times

shortly before his death, the deceased had made threats against the prisoner. This evidence the Court ruled out, and an exception was taken. In this the Court unquestionably erred, although they may never have come to the knowledge of the defendant till after the homicide was committed. If the deceased had made threats against the defendant, it would be a reasonable inference that he sought him for the purpose of executing those threats, and thus they would serve to characterize his conduct towards the prisoner, at the time of their meeting and of the affray. If he had threatened to kill, maim or dangerously beat the defendant, it would be a fair inference, especially so long as the evidence shows that he had a hatchet in his hand—that he had attempted to accomplish his declared purpose; and, if so, then the prisoner was justified in defending himself, even to the taking of the life of his assailant, if necessary. While the threats of themselves could not have justified the prisoner in assailing and killing the deceased, they might have been of the utmost importance, in connection with the other testimony, in making out a case of necessary self-defence. The evidence offered was proper, and should have been admitted.” *Campbell v. People*,^{*} 16 Ill., 17.

In the present case, the evidence was highly important and proper to illustrate and explain the character of the act. The threats were continuous and frequent; they were all blended and inseparable; and the last threat, when the deceased had his revolver with him, showing an ability to carry out and accomplish his purpose, went to form a part of the *res gestæ*, and must be considered as of the same transaction.

Defendant proposed to prove, that, whilst the surgeons were dressing the wound, and immediately after the shooting took place, Moore, in speaking about the matter, said that “Sloan was not in fault; that he had drawn on the difficulty by attacking him, and that if his pistol had not hung when he went to draw it, he would have

^{*} *Ante*, p. 282.

killed him." This declaration was excluded by the Court on the ground that it was no part of the *res gestæ*, and was not shown to have been made *in articulo mortis*. In *McMillen, v. State*, 13 Mo., 30, it was proposed to prove by the witness that she had heard Jackson Logsdon, the deceased, recently before the affray, threaten to shoot one of the defendants. The testimony was rejected. Judge NAPTON, writing the opinion of the Court, says: "As Jackson Logsdon was not a party to the prosecution, what he said is no more than the hearsay of any other man, and was, therefore, upon general principles, inadmissible. Had his declarations been *in articulo mortis*, or a part of the *res gestæ*, they would have come within the exceptions to the general rule. The bill of exceptions does not show *when* the declarations were made. 'Recently' is a word of indefinite character." Here it is admitted that if the threat had been made at the time the crime was committed, or so soon thereafter as to have made it constitute a part of the *res gestæ*, it would have been properly receivable. The question was directly presented to this Court for adjudication in the case of *Brownell v. the Pacific R. R.*, 47 Mo., 239. There the point raised was in reference to the admission of the declaration of Brownell, the deceased, as to how the accident happened. This declaration he made immediately after the accident, and, upon a review of the authorities, we held the declaration admissible, as constituting a part of the *res gestæ*.

The ruling in that case is decisive of this, and there is no necessity for repeating the reasons for the conclusion we there arrived at. The evidence was admissible, and the Court erred in rejecting it. We will not enter upon an examination of the instructions in detail, but only refer to one or two given for the prosecution. The tenth instruction given for the State, in reference to the law of self-defence, is objected to, and complained of by the defendant. The instruction, though unhappily and inartistically drawn, is substantially correct. It is in accordance with the doctrine laid down by the best elementary

writers, and has been constantly acted upon and enforced by the Courts.

When a person apprehends that some one is about to do him great bodily harm, and there is reasonable ground for believing the danger imminent that such design will be accomplished, he may safely act upon appearances, and even kill the assailant, if that be necessary to avoid the apprehended danger; and the killing will be justifiable, although it may afterwards turn out that the appearances were false, and there was, in fact, neither design to do him serious injury, nor danger that it would be done. He must decide at his peril upon the force of the circumstances in which he is placed, for that is a matter which will be subject to judicial review. But he will not act at his peril of making that guilt, if appearances prove false, which would be innocence, had they proved true. *Shorter v. People*,^p 2 Comst., 193; *Campbell v. People*, *supra*. On the trial of Thomas O. Selfridge,^a Judge PARKER, afterwards Chief Justice of Massachusetts, puts this case as an illustration: "A., in the peaceable pursuit of his affairs, sees B. walking rapidly towards him with an outstretched arm and a pistol in his hand, and using violent menaces against his life as he advances. Having approached near enough in the same attitude, A., who has a club in his hand, strikes B. over the head, before or at the instant the pistol is discharged, and of the wound, B. dies. It turns out that the pistol was loaded with powder only, and that the real design of B. was only to terrify A." Upon this case, the judge enquires, "will any reasonable man say that A. is more criminal than he would have been if there had been a bullet in the pistol? Those who hold such a doctrine must require that a man so attacked, must, before he strikes the assailant, stop and ascertain how the pistol was loaded—a doctrine which would entirely take away the right of self-defence; and when it is considered that the jury, who try the cause, and not the party killing, are to judge of the reasonable ground of

^p*Ante*, p. 256. ^a*Ante*, p. 18.

his apprehension, no danger can be supposed to flow from this principle." The judge had before instructed the jury that "when, from the nature of the attack, there is reasonable ground to believe that there is a design to destroy his life or commit any felony upon his person, the killing of the assailant will be excusable homicide, although it should afterward appear that no felony was intended." Selfridge's Trial, 160. Any other doctrine would destroy the right of self-preservation, and impose a burden which would render persons in dangerous positions, powerless to protect themselves.

Our statute has placed killing in self-defence under the head of justifiable^r homicide, and hence the common-law rule applies in the fullest extent. The law, as announced by Judge PARKER, is of ancient origin. The principle was recognized and acted upon in Levett's case, recited by JONES, J., in Cook's case Cro. Car., 538, to the following effect: Levett was in bed with his wife and asleep, in the night, when the servant ran to them in fear, and told them that thieves were breaking open the house. He arose suddenly, and taking a drawn rapier in his hand, went down and was searching the entry for the thieves, when his wife, espying some one whom she knew not, in the buttery, cried out to her husband in great fear, "Here they be that would undo us!" Levett thereupon hastily entered the buttery in the dark, not knowing who was there, and, thrusting with his rapier before him, killed Frances Freeman, who was lawfully in the house and wholly without fault. On these facts, found by special verdict, the Court held that it was not even a case of manslaughter, and the defendant was wholly acquitted.

Now here the defendant acted upon information and appearances which were wholly false; and yet, as he had reasonable ground for believing them true, he was held guiltless.

Roscoe, in his work on Criminal Evidence, says, that

^r Upon the distinction between justifiable and excusable homicide, see note to Selfridge's case, *ante*, p. 16.

it is not essential that an actual felony should be about to be committed in order to justify the killing. If the circumstances are such, as that, after all reasonable caution, the party suspects that the felony is about to be immediately committed, he will be justified. Roscoe's Crim. Ev., 639. The books give numerous examples, and apply the principle approvingly. 1 Hale P. C., 42, 474; 1 Hawk. P. C., Curwood's ed., 84; 1 East P. C., 275; 1 Russell on Crimes, 540-50. * * * * *

Judgment reversed

NOTE.—The question of the admissibility of evidence of threats made by the deceased against the defendant, and communicated to the defendant, in trials for homicide, again came before the Supreme Court of Missouri in *The State v. Keene*, 50 Mo., 357. WAGNER, J., stated the case, and delivered the judgment of the Court, as follows:

“The defendant was indicted for killing one Evans, and on the trial the jury found him guilty of murder in the second degree, and assessed his punishment at sixteen years in the penitentiary.

“It seems that the defendant had been on terms of amity and good will with Evans till the day before the killing took place. On that day, they met at the house of a friend, together with other company, when the defendant treated Evans with friendship and civility. But Evans had ascertained that the defendant was engaged to be married to a niece of his wife, and was greatly enraged about it, and instead of returning the kind treatment of the defendant, he violently assaulted him with a pistol and knife, and swore that he would kill him, and nothing but his blood would satisfy him.

“Through the intercession of friends, he was kept from carrying out his purpose or hurting the defendant; but the defendant, in order to save himself from violence and death, was obliged to hide in another room, and finally make his escape from a back door. After this occurrence, Evans renewed his threats—declared that he would make no compromise in reference to the matter—that he would kill defendant on sight, if it was the last act of his life.

“These threats were communicated to defendant the same evening.

“It further appears that on the morning of the occurrence above referred to, and some two hours prior to the killing, the defendant, in company with another person, went out to hunt prairie chickens, and when they had reached a point near the railroad depot, and just after the defendant had discharged his gun at some chickens, Evans came out of the depot and halloed to the defendant, saying to him that he was a damned cowardly son of a bitch, and that if he would come up there he would thrash hell out of him, and that he intended to kill him if he married his niece. The only answer defendant made to this abuse, was to ask Evans what he wanted to kill him for; at the same time he told his companion that that would break up their hunt; and they immediately started home. On

his arrival at home, defendant went to his stable to put his horse up, and whilst he was still at his stable, Evans, in company with two other persons, rode up. Evans went into a store across the street from the stable. Defendant wanted to go into the store to warm, for it was cold weather, but he was warned not to do so, as he would be in danger of his life if he met Evans. Defendant then stayed in the stable, and sent friends to have an interview with Evans, for the purpose of trying to arrange the difficulty. He was willing to almost anything, accept the most humiliating terms, and only desired that his life might be saved. But Evans was obdurate; he would abate nothing of his hatred and his desire for blood, and the life of defendant only would satisfy him. Evans then came out on the street, and was in fierce altercation with the persons around him, when the defendant fired the shot from which he afterwards died. The defendant immediately gave himself up, declared that he fired the shot, and that he did it to save his own life.

"At the trial, the Court excluded all evidence of what occurred on the day previous to the killing, and the threats made by the deceased in reference to his intention to kill the defendant. In this, the Court unquestionably erred. This whole transaction, and all the matters connected with the difficulty, are so nearly allied that it is impossible to separate them. From the inception to the fatal consummation, less than twenty-four hours intervened. The threats continued down, uninterruptedly, and were all nearly coeval with the killing, and they were all brought home to the knowledge of the party who did the slaying. They constituted the chain of one continued hostile series of acts by the deceased, down to the time he was shot. That they had created a dread in the breast of the defendant, that he was in danger of losing his life, there can be no doubt, and the evidence was admissible, to show the reasonableness of his fears. *State v. Sloan*, 47 Mo., 604." [*Supra.*]

* * * The judgment was reversed.

STATE V. GOODRICH.

[19 Vt., 116.]

Supreme Court of Vermont, January Term, 1847.

STEPHEN ROYCE, *Chief Judge.*

ISAAC F. REDFIELD, }
MILO L. BENNETT, } *Assistant Judges.*
HILAND HALL,

INDICTMENT FOR ASSAULT—ADMISSIBILITY OF EVIDENCE OF HOSTILE DECLARATIONS BY ASSAILANT, PREVIOUS TO ASSAULT, AND OF PREVIOUS THREATS AND AFFRAYS.

1 Where on the trial of an indictment for an assault, the prosecuting

witness was asked if he did not, while on the way to the defendant's house, on the night of the affray, declare to a particular person, that he wanted some powder to blow up the defendant's house, which he denied; it was held competent to show by other witnesses that he did make such declaration.

2. For the purpose of showing *with what intent* he went to the defendant's house, and also his feelings towards the defendant, all his declarations in connection with his acts, are competent from the time of his starting out on the expedition; and these may be shown by himself or by any other witness, and probably without first enquiring of the prosecuting witness himself. [See Sloan's case, *ante*, last case, and citations.]

3. Evidence tending to show that there had been, at times previous to the assault charged upon the defendant, affrays at the dwelling house of the defendant, and that his house had been attacked and his property destroyed, and that the prosecutor was one of the company, and that he had frequently threatened violence against the person of the defendant, would be admissible, if the testimony showed that the defendant, at the time of the assault, had just cause for alarm and to fear serious injury to his person or property: *otherwise*, if offered merely to show the temper and disposition of the prosecuting witness towards the defendant. [Acc. Zellers' case, *ante*, p. 471, note; Monroe's case, *ante*, p. 442; Rector's case, *post*; Meade's case, *post*.]

Indictment for assault upon one Green, by firing at him with a gun. Plea, not guilty, and trial by jury, June Term, 1846, BENNETT, J., presiding.

On trial, evidence was given tending to prove that a quantity of hay had been attached, at the suit of Green against the respondent, as the property of the respondent; that, on the evening of the 16th of October, 1845, Green, and one Conner, at the request of the constable who made the attachment, went to the house of the respondent, where the hay was, for the purpose of seeing that the hay was safe, and not in any way wasted; that they arrived there between nine and ten o'clock in the evening; and that, while quietly there, making no disturbance, the respondent fired his gun, loaded with powder and shot, upon Green, and wounded him.

The respondent claimed, that the assault and battery, if committed by the respondent, were committed by him in defence of his person, or property; and offered evidence tending to prove that there had, at previous times, been affrays at the dwelling house of the respondent, and that his house had been attacked and his property

destroyed, and that Green was one of the company, and that Green had frequently threatened violence upon the person of the respondent. The Court decided that it was not competent, as defence to this prosecution, to enquire into previous affrays or contentions between the respondent and Green, and excluded the evidence offered, but admitted evidence to show all that took place on the evening, or night, when the affray complained of took place, tending to show that the assault and battery complained of were committed in defence of the person, or property, of the respondent.

Green, who was a witness on the part of the prosecution, was asked by the respondent, on cross-examination, whether he did not say to a certain person, while he was on his way to the house of the respondent, on the evening when the affray complained of took place, that he wanted to get some powder for the purpose of blowing up the house of the respondent; and Green denied that he so said. The respondent then offered to prove that Green did so say; but the Court excluded the evidence.

The jury returned a verdict of guilty. Exceptions by respondent.

Linsley & Beckwith, for respondent; *G. W. Grandy*, State's Attorney.

REDFIELD, J., delivered the opinion of the Court:

The question made in the defence of the present case was, whether the principal witness on the part of the State, upon whom the defendant is charged with making an assault, did himself make the first assault, and whether what the defendant did was done in self-defence. Green testified that he did not make any disturbance about the defendant's dwelling, or assault upon his person. He was then asked, if he did not, while on the way to the defendant's house, on the night of the affray, declare to a particular person, that he wanted some powder to blow up the defendant's house, which he denied. The defendant then offered to show that he did make

such declaration, and the Court rejected the evidence, upon the ground that the enquiry concerned a matter wholly collateral to the main issue.

It is not always easy to determine, precisely, what is collateral to the main issue. Something on that head must be left to the discretion of the judge presiding at the trial. In the present case, if it was material to know with what *intent* the witness went there, that could only be shown by his acts and his declarations in connection with those acts. For this purpose, the efforts and enquiries which the witness made for help and implements, whether of offence or defence, would be material.

As part of that intent it might have been shown, that he declared his intention to be only to see if the hay remained ; and we apprehend what is stated in the bill of exceptions, in regard to the tendency of the testimony on the part of the State, to show that he went there *with that intent*, must have been derived, partly at least, from his declarations on the way and while there. That is the only way it could be shown, aside from his own testimony. And we think, that all of his declarations from the time of his setting out on this expedition, in connection with his acts, are competent to show with what intent he went there ; and if an innocent intent may be shown in this way, then the contrary may also be shown in the same manner, and this may be shown by Green or any other witness ; and in this view the evidence was in no sense collateral.

If, then, Green denied making such a declaration, it might be shown that he in fact, did, both as tending to impeach the witness by contradicting him, and as going to establish the fact that he went there for the purpose of beginning an affray, and as tending to justify, perhaps, more vigorous defence of any supposed offensive movements on the part of Green. For a part of the evidence rejected was, that he had repeatedly threatened the defendant ; and it is not impossible, that, if this evidence had been admitted by the Court, the defendant might have satisfied the jury that he had been informed

of the fact of Green's approach, and of his declarations of his intent, although, from the case, this seems hardly probable.

But these declarations are material, as showing the intent with which Green went there, and also his feelings towards the defendant; and it has been held, both in this State and in England, that this last point is a sufficient ground of impeaching a witness, and that the declarations of the witness to this effect may be shown as substantive matter of proof, without first enquiring of him. Lord Stafford's case, 7 Howell's State Trials, 1400, where it was permitted to be shown, that the witness had attempted to suborn witnesses to testify falsely against the prisoner. So in *Thomas v. David*, 7 Car. & Pay., 350, where a female witness was offered on the part of the plaintiff, to prove a promissory note, claimed to be forged, it was permitted to ask the witness if she was not the kept mistress of the plaintiff, for the purpose of showing that she had a motive to favor the plaintiff, or was easily controlled by him, and might thus be induced to give false evidence, and, upon the witness denying it, she was contradicted by other witnesses, the Court holding the matter *not collateral*..

So it is always competent to ask a witness, if he has not *said* he would be revenged upon the party against whom he is called, and this, with reference to the very suit on trial, and if the witness denies having made such declarations, to contradict him, by showing that he did make them. *Harris v. Tippet*, 2 Camp., 638; and in *Pierce v. Gibson*, 9 Vt., 216, it was permitted to show, that an ill state of feeling existed on the part of the witness, as to the party against whom he was called, and this *without first asking the witness*.

Whether, then, we consider the declarations of Green as tending to show, that he went there for the purpose, and with the intent of making a serious assault upon the defendant, as a part of the *res gestæ*, and tending to characterize the whole transaction, both as to the defendant and the witness, and their several acts, and thus

the better to enable the jurors to determine whether the one or the other was the aggressor, and whether the defendant acted in good faith in the matter; or, as tending to show the state of mind, which the witness entertained towards the defendant, and the temptation which he would have, to put the most favorable construction upon his own acts, and the most exaggerated one upon those of the defendant, the evidence was clearly admissible; and probably without first enquiring of the witness; and also, as tending to impeach the witness, by contradicting his main evidence, in which view he must first be enquired of. 1 Stark. Ev., 189, 199.

Upon the other point, the case is too indefinitely stated, to determine, with much certainty, how far the evidence was admissible. If the decision was intended to exclude all evidence of previous threats, or affrays, on the part of the witness, as to the defendant, unless upon that very night, it *might* be clearly wrong, and would be, if the testimony had any tendency to show, that the defendant at the time, had just cause of alarm, and to fear serious injury to his person or property. A case might have been made out, coming within the offer, which would have justified the defendant, even if he had taken the life of the witness; and the decision of the Court, in the terms in which it is expressed, would have rejected it, unless occurring at that very time. But we are not to presume any such case was proposed to be made out by the defendant, or it would have been admitted by the Court. We rather presume, that the offer was intended to show, that the defendant and witness had had frequent quarrels, which was not further important, than as it tended to show the temper and disposition of the witness, Green; and not having been offered for any such purpose, it is impossible for us to say there was error in rejecting it.

Judgment that the verdict be set aside, and the respondent have a new trial. Cause remanded for that purpose.

Verdict set aside and new trial granted.

NOTE.—The case of *Murphy v. Dart*, 42 How. Pr. 31, is somewhat similar to the principal case. It was an appeal to the Supreme Court of New York, Fourth Department, in General Term, May, 1871, from a judgment entered in favor of the defendant, on the report of a referee in an action for damages for an assault and battery. The defence was that the plaintiff committed the first assault, and that the defendant acted wholly in self-defence. Evidence was given for the defendant that the plaintiff had threatened to whip him on the first opportunity; and the defendant was allowed to show, subject to objections, that he had had previous difficulties with the plaintiff.

MULLEN, P. J.: “The evidence on the part of the defendant justifies the finding that the injuries inflicted upon the plaintiff were inflicted in self-defence, after the plaintiff had struck him two or three times. It was for the referee to determine whether there was an excess of force on the part of the defendant, and he, having determined that there was not, we must assume there was none. I have some doubt whether the evidence of the defendant as to previous difficulties between him and the plaintiff was admissible. Evidence was given of threats on the part of the plaintiff, that he would beat the defendant, whenever the latter would furnish him an excuse. This, in connection with previous difficulties between the parties, would aid the referee in arriving at a conclusion as to who was probably the aggressor on the occasion of the affray. In this view and for this purpose, I think the evidence was admissible.” The judgment was affirmed.

The case of *Riddle v. Brown*, 20 Ala., 412, is also similar in its character and conclusions. This was an action of trespass, *vi et armis*, brought by the plaintiff in error for injuries to the person. Both parties claimed the right to enter an enclosure and get ore from a certain ore bank. The plaintiff in error, in attempting so to enter, was set upon and severely beaten by the defendants in error.

In the course of the trial, a witness testified that plaintiff had said, sometime previous to this difficulty, “that Brown and Atkinson (the defendants) were endeavoring to prevent him from getting ore from this ore bank, by threatening to beat him, but they could not do it; the ore bank was his, and he had possession of it; that as to John F. Atkinson, he did not mind him any more than he would a negro; that he could or would take a cowhide to him, if he interfered with him, and run him off the place.” On cross-examination, the witness said he did not tell this to defendants until long after the fight occurred. Upon this, plaintiff moved to exclude the testimony, which the Court refused, and plaintiff excepted.

Extract from the opinion of the Court, delivered by **PHELAN, J.:**

The next assignment of error relates to the admissibility of the evidence showing that plaintiff, after alluding to certain threats of the defendants, had spoken in a very contemptuous manner of the defendant, John F. Atkinson, and had made threats of what he would or could do with him in certain contingencies, before the beating took place, although the witness stated that he had not told the defendant of this until sometime afterwards.

One point made in the case of the plaintiff in the trial below, as appears from the record, was, that admitting the lawfulness of defendant's possession, the beating was excessive, and beyond what was necessary for the defence and maintenance of their possession; and that defendants were

guilty of a trespass on that ground. I must say, that the facts contained in the record, show a case of severe, and, it seems to me, unnecessary infliction of personal injury upon the plaintiff; but this was a matter purely for the jury to determine, under all the facts and circumstances of the case, to whom the Court properly left it.

We see no good objection to the evidence admitted, at least to a portion of it, and the objection was general.

It was competent to show that angry feelings had arisen between these parties, in regard to their respective rights to the possession of the ore bank, previous to the beating, in order to show that plaintiff would naturally expect and come prepared to meet a vigorous resistance, if he was determined to proceed to assert his right to the possession by force, and this might serve to palliate or excuse the conduct of the defendants.

There is no error in the record, and the judgment below is *affirmed*.

KEENER v. THE STATE.

[18 GA., 194.]

Supreme Court of Georgia, June Term, 1855.

JOSEPH H. LUMPKIN, }
EBENEZER STARNES, } *Judges.*
HENRY L. BENNING, }

OPINIONS OF WITNESSES—CHARACTER OF PERSON SLAIN, WHEN AT PARTICULAR PLACE—SCOPE OF THE EVIDENCE IN TRIALS FOR HOMICIDE—UNCOMMUNICATED THREATS—THREATS, RECENT OR REMOTE—CHARGING LAW OF SELF-DEFENCE—PROVINCE OF THE JURY—ACTING UPON APPEARANCES OF DANGER.

1. Ordinarily, a witness who testifies, must state facts, and not his opinion or expectation, which is the conclusion of his mind from the facts. It was, hence, proper to exclude a question, "whether the tone of voice, with the language and manner of the deceased, were not such as to cause him, the witness, to look for a difficulty." [Acc. *Hudgins v. State*, *ante*, p. 470, in note to *Monroe's case*; *Hawkins v. State*, note a., *infra*.]

2. Where the character of a party, as to any particular trait, or as developed under special circumstances, is put in issue, it would seem that it should be established by evidence as to general reputation, and not positive evidence of general bad conduct. [Acc. *Dupree v. State*, *post*; *Franklin's case*, *post*; *Robert Jackson's case*, *ante*, p. 486. But see *Fahnestock's case*, note c., *infra*.]

3. It is a sound principle, that a man may have different general characters adapted to different circumstances and localities; as a character for the rail cars, and a character for the brothel; a character for the church, and a character for the street; a character when drunk, and a character when sober. Where the killing took place in a brothel, it was therefore competent to ask a witness, "whether he was acquainted with the general character of the deceased for violence *in the place where the difficulty occurred,*" and "what was the character of the deceased for violence *at that particular place.*" [See Fahnestock's case, in note c., *infra*.]

4. The general rule, that *all* the circumstances of a transaction may be submitted to the jury, provided they afford any fair presumption or inference as to the matter in issue, reaffirmed in this case; and it is said that if this rule were carried out in good faith, it would produce the most beneficial results. [Acc. Pridgen's case, *ante*, p. 416; and see Myers' case, *ante*, p. 432, and note; Monroe's case, *ante*, p. 442, and note.]

5. Therefore, recent threats, made by the deceased against the prisoner, but not communicated to the prisoner, are admissible for the purpose of showing the *quo animo* with which the deceased went to the place of the fatal encounter. [See the cases cited to this point in the syllabus of Sloan's case, *ante*, p. 516.]

6. The true distinction, as to the admissibility of evidence of threats, is this: When sought to be introduced by the defendant as a justification of the homicide, and without any overt act, he must show that they have been *communicated*; but when offered to prove a substantive fact, namely, the state of feeling entertained by the deceased towards the accused, it is competent testimony, whether a knowledge of it be brought home to the defendant or not. [See Scoggins' case, *post*, where the distinction is drawn.]

7. The remoteness or nearness of time, as to threats and declarations, pointing to the act subsequently committed, makes no difference as to the competency of the testimony. [Citing 3 Strobhart's L. R., 517, note. Contra, Jackson's case, *ante*, note, p. 520; Hays' case, *ante*, p. 492; Sloan's case, *ante*, p. 516.]

8. Where there is *any evidence* tending to raise a doubt whether the killing was in self-defence or of malice, it is the right of the prisoner to have *all* the law relating to self-defence and applicable to his case, given in the charge to the jury. [Acc. Burke's case, *ante*, p. 126; Benham's case, *ante*, p. 123. See Scott's case, *ante*, p. 163, and note; Little's case, *ante*, p. 487, last point.]

9. Hence, under the facts of this case, it was held clearly erroneous for the Judge, after giving in charge the 15th section of the 4th division of the Penal Code of Georgia, to refuse to give in charge the 12th and 13th sections.

10. The fact that the jury are not permitted to take the Code into their consultation room, and that they know nothing of the law except, such parts of it as are given them in charge by the Court, is strongly suggestive of the propriety of withholding no law from them which they are entitled to consider. [As to juries taking books of the law to their consultation room, see Selfridge's case, *ante*, p. 24; State v. Patterson, 12 Am. Law Reg., N. S., 647.]

11. The province of the jury criminal case, to resolve, by their verdict, questions of *law* as well as of fact, discussed and upheld; and it is said, that, in order that they may truly decide the law, they are entitled to *the assistance* of the Court.

12. If the prisoner, at the time of the killing, was under the fears of a reasonable man, that the deceased was manifestly intending to commit a personal injury upon him, amounting to felony, the killing was justifiable homicide. [Acc. Sloan's case, *ante*, p. 517, 6th res., and cases there cited.]

13. If the prisoner was under similar fears of some act of violence and injury less than a felony, his offence was manslaughter. [See Grainger's case, *ante*, p. 238, and note.]

Henry C. Keener, was placed upon trial for the murder of James Reese. The testimony, so far as it is material to state it, and so far as it is not disclosed in the opinion of the Court, showed that the killing took place at a house of ill-fame, kept by a woman named Yarborough, on McIntosh street, in the city of Augusta. The prisoner and deceased were there between ten and eleven o'clock at night. The prisoner was in the room of one of the inmates, undressed. The deceased went to the window of the room where the prisoner was, with an open knife in his hand, made a noise at the window and demanded entrance. The prisoner replied, "You come in here, God damn you." The deceased responded, "You open, and I will come in." The deceased was then persuaded to go into the parlor. About ten minutes after, Keener came out upon the piazza, and said, "Here I am." A witness endeavored to persuade him to go off and not have any fuss. The prisoner said he would not; that he had been run off several times; had been woke up out of his bed time and again, and did not intend to be run off any more. The deceased then came out of the parlor, within ten feet of the defendant, and said, "You are afraid to point your pistol, you pusillanimous son of a bitch." The defendant replied, "What was that you said?" or dared the deceased to repeat the words again, at which the deceased repeated the words; when the defendant raised a pistol in his right hand, fired at the deceased, and then

ran. The testimony, which, in the original report is set out in full, shows that the prisoner and deceased had both been in the habit of frequenting the house where the killing took place; that they were rivals for the favor of the keeper of the brothel; that the deceased had been in the habit of running the prisoner away from the house; and the evidence makes it clear that he went there with a like purpose on the fatal night, and that the prisoner went there armed, with the expectation of a difficulty with the deceased. The deceased was sitting down when the shot was fired. One witness testified, that the deceased asked some one for a pistol, while he and the defendant were upon the piazza, immediately before the firing. The shot took effect in the abdomen of the defendant, and he died in an hour afterwards.

On cross-examination of the State's witness, Goodwyn, counsel for defendant, propounded the question, "Whether the tone of voice, with the language and manner of deceased, at the time he walked through the piazza to the room in which the defendant was, were not such as caused him to expect or look for a difficulty?" The Court refused to allow the question to be asked, objection having been made by counsel for the State, the Court holding that the witness could not give his opinion, but could only state the facts, which was sufficiently done by saying that the language was harsh and excited his attention. To which ruling, counsel for prisoner excepted.

Counsel for prisoner having asked the witness, Prater, "Whether he was acquainted with the general character of deceased for violence, in the place where the difficulty occurred?" objection was made by the counsel for the State. The Court, thereupon, refused to allow the question to be asked; to which ruling, counsel for prisoner excepted. And the further question having been asked, "What was the character of deceased for violence in that particular place?" and objection thereto having been made by counsel for the State, the Court refused to

allow the question to be asked; to which ruling, counsel for prisoner excepted.

A verdict of guilty was rendered. Whereupon, counsel for prisoner, moved the Court for a new trial, upon grounds which are stated in the opinion.

LUMPKIN, J., delivered the opinion of the Court:

* * * * *

As to the third ground: A witness, Goodwyn, introduced by the State, upon cross-examination, was asked, "Whether the tone of voice, with the language and manner of the deceased at the time he walked through the piazza to the room in which the defendant was, was not such as to cause him to expect or look for a difficulty?" This question was not allowed to be put, but the witness was permitted to testify what the tone of voice, language and manner of Reese, at the time, were, which he did.

We regret that this question was not suffered to be propounded, because of its entire immateriality. Every body at the house where this homicide was committed that night, expected a difficulty, as a matter of course. There could have been but one answer to the interrogatory, and that would not have weighed a feather with the jury; and yet, hours perhaps, have been consumed, first and last, in discussing the rule of evidence applicable to the facts contained in the record. We subjoin the reasons given by the Judge, for rejecting this testimony, in his own language:

"This question was not allowed to be asked, because the answer would not be as to a fact, but the expectation of a witness, arising out of a series of facts, either then in evidence, or capable of being put in evidence. Now, the expectation of the witness was nothing more than the deduction or conclusion of the mind of the witness, as to the effect which these facts produced on his mind, and inferentially, would be likely to produce on the mind of Keener.

"It is not for a witness to draw such conclusions; that belongs to the jury. This is the general rule of law—to

which, however, there are exceptions; as in questions of sanity or insanity, art or science, and others of a like nature, in which the *opinion* of a witness, founded on facts too multitudinous and minute to be presented to the minds of jurors, or of a skill, the witness' own, is admitted. There is another class of exceptions, founded chiefly on defect of memory, in which the witness may give his belief; such as questions of personal identity, handwriting, &c., and others in which he may state his *impressions or understanding*. Such were the cases of *Moody and wife v. Davis*, 10 Ga., 403, and *Fielding and others against Collier*, 13 Ga., 495. But the Court does not find the case before it to be within any of the exceptions. The question asked the witness was, as to what he expected from the conduct of Reese—which conduct was intended to be proved by the impression it made on his mind; or, as expressed by one of the counsel, a daguerreotype likeness of his conduct, as reflected from the mind of the witness, was wanted. It was certainly important to ascertain what was the conduct of Reese on that occasion, even to the minutest action. But the mirror from which it was sought to have it reflected, may not have been true. There may have been the seams of credulousness, timorousness, passion or prejudice to disturb the likeness; and which may have been very different from that which would have been made on the mind of the jury by a simple statement of facts."

Our brother, we believe, has stated with accuracy the rule as laid down in the books. 1 Greenl. Ev., § 440. And yet, the writer from which it is taken, cites with approbation the case of *McKee v. Nelson*, 4 Cowen, 355, in which it was held, that in an action for breach of promise to marry, a person accustomed to observe the mutual deportment of the parties, may give in evidence *his opinion* upon the question, whether they were attached to each other; and that, too, without it being made to appear that the witness was an *expert* in affairs of the heart.

The Court admit the general rule as stated by Judge

HOLT, namely: that witnesses are not allowed to give their opinions to a jury, but suggest, that there are a thousand nameless things, indicating the existence and degree of the tender passion, which language cannot specify, and which cannot be detailed to a jury. Why, we would ask, may not the various facts which manifest the existence of *attachment*, be as capable of specification as any other matter whatever? Why may not the existence of *love*, as well as *revenge*, being both of them elementary principles of human nature, be proven by external signs and the multiplied exhibitions of its energy? There is no radical difference; and the rule of evidence should be the same, as applicable to both of these master passions. If it be allowable to ask, as in the case of McKee and Nelson, whether, in the opinion of the witness, the parties were not attached to each other, it would seem to justify the enquiry, whether the circumstances which surrounded the accused, were not sufficient to excite the fears of a reasonable man. The defendant, however, is required to act upon his own judgment, and not that of another, and is responsible to the law for the soundness of his conclusion. And, foreseeing, as we do, the indefinite multiplication of collateral issues to which any other doctrine would lead, we affirm the judgment of the Court below upon this ground.*

*A similar question arose in a subsequent case in Georgia. It was assigned as error, that the Court refused to allow the defendant's counsel to enquire of witnesses who were present at the killing, whether, from the conduct, countenance and language of the deceased, immediately preceding the homicide, they believed the deceased intended to kill the accused. Upon this point, LUMPKIN, J., speaking for the Court, said: "Was the Court right in refusing to allow the witnesses to testify as to their belief as to what was the purpose and intention of Scott? In *Hudgins v. The State*, 2 Kelly, 173, [*ante*, p. 470,] this Court held that the opinion of a witness as to the intention of the deceased in approaching the slayer is not admissible. The same rule is laid down in the case of the *State v. Scott*, 4 Ired., 409, [*ante*, p. 169.] The Court say, 'the belief that a person designs to kill me will not prevent my killing him from being murder, unless he is making some attempt to execute his design, or, at least, is in an apparent situation to do so; and thereby reasonably induces me to think that he intends to do it immediately.' Here, there was certainly no such purpose in the mind of the deceased, as he had no weapon of any sort. Prisoner must have known that Scott was unarmed. The witnesses were not asked if they

The place where Reese was killed, was a brothel of notoriety in the city ; and counsel for prisoner proposed asking the witness, Prater, " whether he was acquainted with the general character of deceased, for violence in the place where the difficulty occurred?" and, " what was the character of deceased for violence in that particular place?" Objection was made to each of these questions by counsel for the State, and the Court refused to allow them to be asked. To which ruling, the prisoner, by his counsel, excepted. And this constitutes the fourth error assigned.

No authority was read for or against this point, except the cases of *Boswell v. Blackman*,^b 12 Ga., 591, and that establishes this principle only: that where a witness is sought to be impeached, and is shown to have a general reputation for truth and veracity in the *county* of his residence, that that may be considered the *neighborhood* in which he lives, for the purpose of satisfying the de-

thought that Scott intended to kill Hawkins *at the time* of the homicide. To such a question, there could have been but one answer." *Hawkins v. The State*, 25 Ga., 207, 210.

^b *Boswell v. Blackman*, 12 Ga., 591. NISBET, J.: * * * "The usual form, with us, of putting the question with a view to impeaching the credibility of a witness is, as the Court below held that it should be put, thus: 'Are you acquainted with the general character of A. B. for truth and veracity in the neighborhood where he resides?' The question proposed to be put and ruled out in this case, was this: 'Do you know the general character of A. B. for truth and veracity in the county of Russell?' Disconnected with any other proven facts, I should hold that the last-named question would not do; but, before putting it, the plaintiff in error had proven, by the impeaching witness, that they had known the witness, sought to be impeached, for the last eight or ten years in the county of Russell, Alabama; that he was generally known, and had a general reputation in the county. These things being true, the question propounded comes within all the reasons upon which the other question is held proper. The impeachment must be by persons acquainted with the witness; and they are called to speak of his general character for truth and veracity—not the world over, or in London or Paris or Columbus, but in that circle where his real character is best known, to-wit: in the neighborhood where he lives. Now, when a witness is generally known, and has a general reputation in a county, that county may be fairly considered his vicinage. It is fair to infer, under such circumstances, that his true character for truth is as well known in that county, as men's character for truth ordinarily is known in their neighborhood."

mands of the law. I took occasion, when delivering the opinion in this case, to state, that for myself, I was inclined to hold, that the rejection of the questions, in the form in which they were put, was error; but that in deference to the opinion of my brother STARNES, as well as to that of the learned Judge, who presided at the trial, I was content to affirm the judgment, with this distinct explanation: That it was competent to give proof as to the general conduct of the deceased for violence at this place—especially toward Keener—the testimony showing that they had long been rivals for the favor of the keeper of the brothel.

Upon examination, I am satisfied that the questions propounded to Prater, were in the proper form.

Mr. Greenleaf, in treating of the rule as to the admissibility of evidence of general character, concludes thus: "But it seems that the character of the party, in regard to any particular trait, is not in issue, *unless it be the trait charged against him*; and of this, it is only evidence of *general reputation*, which is to be admitted, and not positive evidence of general bad conduct" And the author quotes Swift's Evidence, and numerous cases, English and American, to sustain this proposition. 1 Greenl. Ev., §55, note. The particular trait involved in the issue here, was the character of Mr. Reese for violence in this place, a circumstance relied on by Keener, in part, for his justification in committing the homicide. And it would seem that the character of the deceased for violence, was to be established by general reputation, rather than positive evidence of general bad conduct.*

* In establishing the character for violence, of the person slain, in trials for homicide, the rule as to the mode of proof seems to be the same as that which obtains in the impeachment of witnesses: that is to say, evidence of particular acts of bad conduct, unconnected with the case, will not be heard. Thus, in *Dupree v. The State*, *post*, it is held that proof that the deceased was a convict, escaped from the Georgia penitentiary, was inadmissible. So, in *Franklin's case*, *post*, it is held that the fact that the deceased had attempted to shoot a woman, was not admissible for the purpose of showing his bad and dangerous character.

So, in *Robert Jackson's case*, *ante*, p. 486, it was held proper to exclude evidence of particular acts of hostility by the deceased towards other parties.

Either mode of proof will be satisfactory to the defendant's counsel in the present case, provided we repudiate the doctrine, as we distinctly do, that a man may not have different general characters, adapted to different circumstances and localities; that is, a character for rail cars, and a character for the brothel; a character for the church, and one for the street; a character when

And the same ruling was made in *People v. Henderson*, 28 Cal., 469, with reference to the threatening and violent conduct of the deceased towards other persons, at a public meeting on the night of the killing, the defendant being present, but it not appearing that he knew of the same; as well as of similar conduct towards others ten days before. And the same question is ruled in the same way in *Dupree's case*, *post*, with reference to violent conduct of the deceased towards a hireling of the defendant several weeks before the killing. And see *Rector's case*, *post*.

In *Fahnestock v. The State*, 23 Ind., 231, 237, the question was presented in a manner much resembling the manner in which it is presented in the principal case. The facts and conclusions of the Court will appear in the following extract from the opinion of the Court, delivered by ELLIOTT, J.: "During the progress of the trial, James Chizum was introduced and sworn as a witness on the part of the defendant, and during his examination, testified with reference to a particular act of violence by the deceased, *when intoxicated*. The defendant's counsel then asked the witness this question: 'Do you know the general character of the deceased when he was intoxicated, from the reports of his neighbors?' The Court refused to permit the question to be answered, which refusal is assigned as error. The object of the question is very obscure, if at all perceptible. The *general* character of the deceased, whether sober or drunk, would seem to have little, if anything, to do with the defendant's guilt. If the deceased was in the habit of becoming intoxicated, and when in that condition was quarrelsome and violent, and that fact was known to the defendant; and, if it is further claimed that deceased was intoxicated at the time the defendant met him in the saloon, a short time before his death, and that the defendant's conduct on that occasion is claimed to have been influenced by a knowledge of the alleged violent habits of the deceased when intoxicated, the question of such habits or disposition would seem to be one of *fact* rather than of general character. The Court did permit proof of the temper and disposition of the deceased, and of particular acts of violence when he was intoxicated; but if evidence of the general character of the deceased when intoxicated, as to his being quarrelsome and violent, were permissible in such a case, still the question propounded to the witness was correctly overruled. General character is the opinion, estimate or knowledge of those residing in the neighborhood generally; but the question here propounded does not ask the witness if he has a personal knowledge of what that character is, as derived from the general opinion of the neighborhood, but if he knows the character from reports of his neighbors. Besides the question was not directed to any particular point of character, about which it could be at all material that the jury should be informed."

drunk, and a character when sober. Instead of a doctrine like this being too loose for judicial investigation, we hold that it is in accordance with the soundest elementary principles. In *all cases*, where evidence is admitted, touching the general character of the party, it ought, manifestly, say the authorities, to bear reference to the nature of the charge against him.

A schoolmaster is indicted for an assault and battery upon one of his pupils; he defends himself under his acknowledged right to inflict moderate correction. The charge puts in issue the character of the teacher for violence; and where, pray, would you go to ascertain that character? among his fellow-men or in the school-room? There can be but one response to this question. An officer in the army or navy is tried for cruelty to a soldier or sailor; what has his reputation in the community, generally, to do with the trait of character involved in the issue? It is in the barracks, or on board the man-of-war, that we look for what we wish to learn. There are thousands of men in this country, mild as a May-morning when sober, but demoniacs when drunk; have not such two distinct characters? Their moral identity is completely lost—their individuality metamorphosed under the maddening effects of alcohol. Philip drunk and Philip sober, were altogether different persons. As a conductor, Mr. Reese was uniformly gentlemanly; at the brothel, he was menacing, turbulent, rash, reckless and raging.

The case of *Quesenberry v. the State*, 3 Stewart & Porter, 308, although not strictly applicable to the precise point which we have been considering, is, nevertheless, so pertinent to the case, that I am induced to make the following quotation from the opinion of the Court, as delivered by Chief Justice LIPSCOMB: ^d * * *

^d Here the learned judge quoted at length from Quesenberry's case. We omit the quotation from the text, and give in full that part of the opinion which relates to the admissibility of evidence of the character of the deceased for violence. It is as follows: LIPSCOMB, Ch. J.: * * *

“The second point reserved for the opinion of this Court is, on the ad-

The next error complained of is, that the Court withdrew and excluded from the jury, all the testimony of James Cosby. This witness testified that on Friday night, before the death of Reese, which was on Sunday evening, he met Reese at the United States

missibility of the testimony offered by the prisoner, and rejected by the Court.

"The circumstances under which this testimony was offered, are not shown, by the record, with sufficient clearness, and distinctness, to enable this Court to determine, whether it ought to have been admitted, or not. That the good or bad character of the deceased, as an abstract proposition, can have no influence on the guilt of the accused, is too clear to admit of controversy. To murder the vilest and most profligate of the human race, is as much a crime, as if he had been the best, the most virtuous, and the greatest benefactor of mankind. But, there can be no doubt, but that when the killing has been under such circumstances, as to create a doubt as to the character of the offence committed, that the general character of the accused, may sometimes afford a clue, by which the devious ways, by which human action is influenced, may be threaded, and the truth attained. It is an acknowledged principle, that, if at the time the deadly blow was inflicted, the person who so inflicts, has well founded reasons to believe himself in imminent peril, without having by his fault, produced the exigency, that such killing will not be murder.

"If the deceased was known to be quick, and deadly, in his revenge of imagined insults—that he was ready to raise a deadly weapon, on every slight provocation; or, in the language of the counsel, his 'garments were stained with many murders'—when the slayer had been menaced by such a one, he would find some excuse, in one of the strongest impulses of our nature, in anticipating the purposes of his antagonist. The language of the law, in such a case, would be, obey that impulse to self-preservation, even at the hazard of the life of your adversary.

"If the killing took place, under circumstances that could afford the slayer no reasonable grounds, to believe himself in peril, he could derive no advantage, from the general character of the deceased, for turbulence and revenge. But, if the circumstances of the killing were such, as to leave any doubt whether he had not been more actuated by the principle of self-preservation, than that of malice, it would be proper to admit any testimony, calculated to illustrate to the jury, the motive by which he had been actuated.

"To this course we can see no good objection; and, it seems pretty certain, that it would often shelter the innocent from the influence of that sound, but not unfrequently severe, maxim of law, that, when the killing has been proven, malice will be presumed, unless explained or rebutted. There can be but little danger of the guilty escaping, under the influence of a prejudice, created by such testimony, against the deceased. The discretion of the judge will be able to control and prevent such a result. And jurors will be able to comprehend the reason and object of such testimony.

Hotel, who remarked to witness that he had not seen him on McIntosh street^o for a good while. Cosby replied that he had not been there for about ten months. Reese then said, that he, himself, did not go there as frequently as he used to do ; that Keener had taken his woman from him ; and he said that Keener was a damned coward, and that he had made him leave there two or three times ; and that if Keener crossed his path, he would kill him. He added, he was going out there before long, and would kick up hell. Nothing more was said.

The testimony of Cosby was rejected, mainly, on the ground that the threats which it proves, were made in a private conversation between Reese and witness, which was never communicated to Keener.

Without stopping to enquire whether the facts related by the witness, apart from the threats, were not admissible, we prefer to confront the question directly ; and to consider whether or not the evidence of Cosby, taken as a whole, should not have been received ? Keener is indicted for killing Reese ; his defence is, that Reese manifestly intended, by surprise or violence, to take his life, or do him some bodily hurt ; that the circumstances were such as to excite the fears of a reasonable man ; and that he acted under the influence of those fears, and not in the spirit of revenge. The proof is, that two nights before the tragedy occurred, Reese entertained the most deadly hostility towards Keener. Jealousy, another name for insanity, of the most malignant character, had taken possession of his bosom, and was shaking the throne of his reason to its very foundation. *Keener had taken his woman from him ;* and if the damned coward ever crossed his path,

“ As I before remarked, it does not appear, from the record, with sufficient clearness, under what circumstances this testimony was rejected, to authorize us to say that it was improperly rejected. We do not know that the views we have expressed were departed from, and we would hesitate to reverse the judgment on this ground. But, the judgment must be reversed on the first point reserved for our consideration ; and remanded for a new trial. And this is the opinion of the Court.”

• Referring to the brothel where the killing took place.

ne would kill him; he was going out on McIntosh street, before long, and would kick up hell there. Prophetic words! He sowed to the wind, and reaped the whirlwind. What a terrible lesson! Well might the wise man say of the house of the strange woman—*"the dead are there!"*

Ought not this conversation, whether communicated to Keener or not, to have been admitted as a substantive fact, to show the *malus animus*, or evil intent toward Keener, with which Reese went to that house that night? Laying aside all technical rules and reasoning, we ask, with the knowledge of the mind and feelings of the deceased disclosed by this witness, would we not, and ought not the jury to listen more indulgently to the alleged apprehension of injury on the part of Keener; as well as to the facts and circumstances upon which he relies to justify his conduct? Do not these previous threats throw light upon Reese's conduct up to the time of the killing? Do they not serve to illustrate the transaction?

It is stated by Mr. Starkie, 1 Treatise on Ev., p. 39; Mr. Roscoe, Ev., pp. 74 *et seq.*, and all the writers on evidence, that the general rule is, that *all* circumstances of a transaction may be submitted to the jury, provided they afford any fair presumption or inference as to the matter in issue. This proposition is exceedingly broad; and, if carried out in good faith, would produce the most beneficial results. Accordingly, in *Richardson v. Royalton and Woodstock Turnpike Co.*, 6 Vt., 496, and *Davis v. Calvert*, 5 Gill & Johnson, 269, it was held, that all facts upon which any reasonable presumption or inference can be founded, as to the truth or falsity of the issue, are admissible in evidence.

In addition to the precedents quoted by Mr. Roscoe, to sustain the general rule of evidence above stated, we beg leave to refer to a few cases in illustration of the rule.

The case from Vermont was this: An action was brought by the plaintiff for damages, occasioned on

account of the insufficiency of defendants' bridge; so that, in passing with a drove of cattle, some eighteen or twenty were precipitated into the river, and seven of these were so much bruised and wounded, as to make it necessary to kill them. It was shown that the reach of the bridge which fell in, had been erected about three years before the accident happened. The plaintiffs further offered to prove, that in 1831, the defendants built the two northern reaches of the said bridge anew, as the old ones had stood about nine years, and that the new reaches thus erected were stronger than the reach which fell in with the cattle. To the admission of this evidence, the counsel of defendants objected. But the objection was overruled and the evidence admitted, as having a tendency to show that the defendants considered that the augmentation of business, and the necessities of the community, required a stronger bridge than the one first erected. The Court admit that the testimony is not very important, but that in modern practice the evidence that is admitted to go to the jury, is more natural, and not governed by rules so artificial as formerly. "Under the rule, then," says the Judge, referring to that taken from Starkie, "did the evidence afford any reasonable inference that the southern reach of the bridge, which, broke, was insufficient, because, in 1831, the defendants built the two northern reaches stronger than the reach that did break? Does it tend to confirm the plaintiff's testimony, or weaken or contradict the defendants'?"

In *Cadwell v. The State of Connecticut*, 17 Conn., 467, it was decided that where an information for keeping a house of ill-fame, charged the offence as having been committed *after* the Statute prohibiting it went into operation, and evidence was offered to prove that the house was reputed to be of ill-fame *previous* to that time, that such evidence was admissible, as conducing to prove that it sustained the same reputation afterwards.

The State v. Goodrich, 19 Vermt., 4 Washburn, 116, is

almost identical with the case under discussion. Goodrich was indicted for discharging a gun at one Green, and wounding him; and the person injured was a witness on the trial; and it appeared that the affray took place on the premises of the defendant. Goodrich insisted that the assault and battery, if committed by him, was in defence of his person or property, and offered evidence to prove that there had, at previous times, been fights between Green and himself; and that his house had been attacked, and his property, by a company of which Green was one; and that Green had frequently threatened violence upon his person. The Court decided that it was not competent, as a defence to this prosecution, to enquire into the previous affrays and contentions between the parties, or to prove a previous threat by Green, that he wanted to get some powder for the purpose of blowing up the house of the defendant.

REDFIELD, Justice, in delivering the opinion of the Supreme Court, stated the question to be, whether Green made the first assault, or whether Goodrich acted in self-defence. And, after stating that it is not always easy to determine what is collateral to the main issue, the Judge proceeds:

[Here the learned Judge quoted at length from Goodrich's case. See the case in full, *ante*, last case.]

The true distinction, we apprehend, as to the admissibility of evidence of threats, and one apparently overlooked in many of the cases, is this: when sought to be introduced by the defendant as a justification of the homicide, and without any overt act, he must show that they have been communicated; otherwise, they can furnish no excuse for his conduct; but when offered to prove a substantive fact, namely: the state of feeling entertained by the deceased toward the accused, it is competent testimony, whether a knowledge of the threats be brought home to the defendant or not.

I will merely add, that the remoteness or nearness of time, as to threats and declarations, pointing to the act subsequently committed, makes no difference as to the

competency of the testimony. 3 Strob., 517, note.¹

Upon the authority of the note, then, as laid down by Mr. Starkie and others, and as illustrated by numerous adjudicated cases, we are clear that the testimony of Cosby should have been admitted, as it conduced to prove, in connection with other evidence, the *quo animo* with which Reese resorted to the brothel on McIntosh street that night; and that his manner and conduct correspond with that purpose, so as to warrant Keener in believing that the same scenes were to be repeated there that night, which had been re-enacted several times before, and that no alternative would be left but to retreat again, as he had done before, twice or three times, or take the consequences.

In view, then, of the frequent failure of justice from the failure of evidence, and thoroughly convinced, as we are, that no competent means of ascertaining the

¹ The case here referred to—The State v. Ford, 3 Strobhart's South Carolina Law Reports, 517, note—was an indictment for stealing slaves. The defendant was convicted, and appealed. He assigned as error (*inter alia*) that the Court had permitted the solicitor for the State to ask David Anderson, if, at any time, the prisoner had proposed to embark in a scheme of villainy like the present; and that the witness was permitted to answer that *two years ago* the prisoner was drinking and made some impertinent observations to him; commended witness' smartness, and told him if he would come over and *join the lodge at his house*, he would make a smart man of him; and that, to James Anderson, the prisoner said there was an easier way of making money than by work. It is to be observed that the only direct evidence in the case was the testimony of a single accomplice; and this and other testimony was introduced to show circumstances of corroboration. The evidence was held on general grounds, competent. "Remoteness of time," said O'NEAL, J., speaking for the Court of Appeals, "cannot render the evidence incompetent. For years may roll over a felon's head while he is arranging his schemes, or while the guilty thought conceived in his mind is ripening into the deliberate purpose with which a crime is committed. A great lapse of time may show that the probability is, that it could not be connected with the crime. This would, however, be always a consideration for the jury in giving effect to the testimony."

It is seen that it is only by reason of its analogy, and that not very direct, that Ford's case can be quoted as illustrating the doctrine of threats in trials for homicide.

As to the remoteness of the threats in point of time, see Sloan's case, *ante*, p. 516, and cases there cited.

truth ought to be neglected, we think the testimony of James Cosby was improperly ruled out. It was pertinent to the issue, and ought to have been submitted to the jury. It showed the intent with which Reese resorted to this brothel; and, also, his feelings towards the defendant.⁵

The conclusion of the principal case on the subject of uncommunicated threats, in trials for homicide, seems not to have been followed in subsequent cases in Georgia.

In *Lingo v. The State*, 29 Ga., 470, 483, such evidence was excluded, and in the Supreme Court, STEPHENS, J., delivering the opinion, said:

"We think that the evidence of Mrs. Duncan, respecting what her husband, the deceased, had said to her in the way of previous threats against the prisoner, was properly rejected, for two reasons. In the first place, it was inapplicable to the case. There was no single act in the whole drama of the killing, that could have been illustrated or modified by it. It was not proposed to show that these threats had been made known to Lingo. That would be a different case. How far these threats would have justified or palliated his act, if he had acted on a knowledge of them, is one question; but it is a very different one, where he knew nothing of them, and where the circumstances of the killing were such as to make it immaterial, whether Duncan had made threats or not. Threats or no threats, he had a right to defend himself, and that was all he did. In the second place, this evidence was [sought] to be drawn from an illegal source, the wife, who was such when the declarations were made to her. The husband was dead, and so, it is true, that the relation had ceased when the declaration was offered; but communications between husband and wife are protected forever."

It is to be observed that this was, beyond question, a case where the accused brought about the combat for the purpose of killing the deceased, and the deceased did no more than act in his necessary defence.

In the subsequent case of *Hoye v. The State*, 39 Ga., 718, 722, the same Court, BROWN, Ch. J., said: "The new trial was also asked in this case, on the ground of newly discovered evidence of Edwards, who swears that deceased told him the day before the killing, that if Hoye, the prisoner, did not pay him some money which he owed him, he intended to kill him. It is not pretended that this threat was communicated to Hoye before the fatal shot was fired. It could not, therefore, have influenced his conduct, and is not admissible evidence in justification of the killing. We are aware that such evidence was admitted in Keener's case, 18 Ga., 194, not by way of justification, but merely to show the state of mind or feeling on the part of the deceased. But that ruling does not seem to have been followed in subsequent decisions. See 25 Ga., 207, [Hawkins' case, *ante*, p. 523], and 29 Ga., 470, [Lingo's case, *supra*]. While we do not overrule that decision, we hold that it is not applicable to this case. We do not see what the state of mind of the deceased had to do with the case, as the deceased was unarmed and made no effort to hurt the prisoner, further than to make threats, and put his hand in his bosom, where he had no weapon. We are

We propose to consider and dispose of the 6th, 7th, 8th and 9th assignments of error together. They present for our review, the main question in this case; all the rest are, comparatively, of minor importance.

In his charge to the jury, the Court, in the language of the bill of exceptions, "failed, omitted and declined, although requested by the counsel for the prisoner so to do, to read to the jury or comment upon the 12th and 13th sections of the 4th division of the Penal Code, upon which counsel for prisoner had mainly relied for his defence. The Court having read the 1st, 2d, 3d, 4th, 6th and 7th sections, then charged the jury, that the section of the Penal Code, applicable to the grounds on which the defence had been placed, was as follows: reading the 15th section; to which failure, omission and refusal to charge, and to the charge as given, counsel for prisoner excepted."

The Court was also requested by counsel for prisoner, to charge the jury as follows:

1st. "That, if they believed, from the evidence, that the prisoner at the time of the commission of the act, was under the fears of a reasonable man, that the deceased was manifestly intending to commit a personal injury upon him, amounting to felony, the killing was justifiable homicide.

2d. "That, if they believed, from the evidence, that the prisoner was under similar fears of some act of violence and injury, less than a felony, his offence was manslaughter, and not murder.

Which charge, so requested, the Court failed and refused to give; to which failure and refusal, counsel for prisoner excepted.

It is also assigned as error, that the Court failed and

therefore, of the opinion that the evidence of previous threats, not communicated to the prisoner before the killing, would not have been admissible, and that the Court did not err in refusing a new trial on this ground."

It is seen by examining these two cases, and that of *Hawkins, ante*, p. 522, that while they do not overrule the principal case, they hold that the facts proved are not appropriate for the application of the rule as to uncommunicated threats therein laid down.

omitted to read to the jury and comment upon the 9th, 10th and 11th, as well as the 12th and 13th sections of the 4th division of the Penal Code, although requested by counsel to do so.

I would remark that, by reference to the bill of exceptions, I do not find that any request was made of the Court to give in charge and expound to the jury, the 9th, 10th and 11th sections of the 4th division of the Code. These three sections relate exclusively to involuntary manslaughter; and there is not a particle of proof to make this killing that offence. It was murder, voluntary manslaughter, or justifiable homicide. The Court was right, therefore, in pretermittting that portion of the Code which defines, with its subdivisions, involuntary manslaughter, and annexes a penalty for each grade of the offence. Counsel for prisoner do not pretend that this law is applicable to his case. To give it in charge to the jury, then, would be to distract and burden their minds unnecessarily and improperly. Whether or not there was error in the remainder of these assignments, depends upon the fact of whether there was *any evidence* upon which the jury might have mitigated the offence from murder to a lower grade of homicide. We go one step further: If the circumstances of the killing were such as to leave any doubt whether Keener had not been actuated by the principle of self-preservation, rather than that of malice, we shall be constrained to remand this cause for a new trial. For the question whether Keener killed Reese to prevent Reese from killing or doing him some great bodily harm, has not, in the opinion of this Court, been fully submitted to the jury. A part of the law only, applicable to the defence, was given; and, where a man's life is at stake, it is fit and proper to allow him the benefit of every provision of the Code.

In every charge of crime, there must be a question of law and a question of fact. Is there any such rule of law as that on which the indictment is founded? Has the defendant violated that rule? The decision of both of these is necessarily involved in the general verdict of

“guilty,” or “not guilty”—the only form of verdict allowed by our Code. The former finding affirms both the existence of the law, and its violation by the accused; the latter, either that there is no such law, or that it has not been transgressed. It is the duty of the judge to declare to the jury what the law is, with its exceptions and qualifications; and then to state, hypothetically, that if certain facts, which constitute the offence, are proved to their satisfaction, they will find the defendant guilty; otherwise, they will acquit him.

In this State—in all free governments—in tenderness to the accused, great latitude has been allowed to counsel in stating and enforcing their views of the law in criminal cases. And a liberal confidence has been reposed in those who are called to defend the liberty and life of the citizen in the hour of trial. And where counsel, in their place, under their professional obligations to the court and the country, insist that certain portions of the law apply to the facts of their client's case, especially where it is *capital*, it would be better to read the law to the jury, with such comments and explanations as the court, possessing the superintending power, might feel it to be its duty to give.

The theory of our system is, that the jury have not only the power, but the right to pass upon the law as well as the facts, in rendering their verdict; and yet, this anomaly stares us in the face, that they are not permitted to take even the Code to their consultation room.^b They know nothing of the law except so much and such parts of it as are given them in charge by the court. This fact alone is strongly suggestive of the propriety of withholding no law from them, which they are entitled to consider. Suppose, as in the present case, it were doubtful whether this offence, as proven by the witnesses, came under the 12th or 13th sections of the 4th division of the Penal Code, as contended for by the defendant's

^b See *State v. Patterson*, 12 Am. L. Reg., N. S. 647; *Sargent v. Roberts*, 1 Pick., 337; *Taylor v. Betsford*, 13 Johns., 487; *Burrows v. Unwin*, 3 Car. & Pay., 310; *Merrill v. Nary*, 10 Allen, 416.

counsel, or under the 15th section, according to the opinion of the presiding judge, should not both have been submitted?

In Case's English Liberties, or The Freeborn Subject's Inheritance, 201-2, it is said, "The office and power of juries, in criminal cases, is judicial; from their verdict, there lies no appeal; by finding guilty or not guilty, they do completely resolve both law and fact." And that in a criminal trial, the jury may determine the law and the fact of the case, has been supported by every English Judge, except Chief Justice JEFFREYS, in the case of Col. Sidney, 3 Hargrave's State Trials, 805. And to their credit be it spoken, that the juries have always been right on fundamental questions of liberty and popular right. 1 Chandler's Crim. Trials, 143, 149, 153, 269, 288; Zenger's case, 17 Howell's State Trials, 675, 724.

But how can they judge of law which is not before them? There is no alternative; either the courts must refer to the jury the whole law of the case, or the supposed distinction between the power of juries in civil and criminal cases should be abolished.

With these preliminary remarks, we proceed to examine the 12th, 13th and 15th sections of the 4th division of the Penal Code.

By the 12th section, it is enacted, that, "there being no rational distinction between excusable and justifiable homicide, it shall no longer exist. Justifiable homicide is the killing of a human being by commandment of the law, in execution of public justice; by permission of the law, in advancement of public justice; in self-defence, or in defence of habitation, property or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony on either; or against any persons who manifestly intend and endeavor, in a riotous or tumultuous manner, to enter the habitation of another, for the purpose of assaulting or offering personal violence to any person dwelling or being therein." Cobb's Digest, Ga. Stat., 784.

Section 13th declares, "that a bare fear of any of those offences, to prevent which, the homicide is alleged to have been committed, shall not be sufficient to justify the killing; it must appear that the circumstances were sufficient to excite the fears of a reasonable man; and that the party killing really acted under the influence of those fears, and not in the spirit of revenge." Ibid.

Section 15th provides, that "if a person kill another in his defence, it must appear that the danger was so urgent and pressing at the time of the killing, that, in order to save his own life, the killing of the other was absolutely necessary; and it must appear, also, that the person killed was the assailant, or that the slayer had really and in good faith, endeavored to decline any further struggle, before the mortal blow was given." Ibid, p. 785.

It is clear that there is no conflict between these different sections. The last two sections may be construed, perhaps, to be qualifications of the first. The right of self-defence is given by the 12th section, against one who manifestly intends to commit a felony, by violence or surprise, on the person or property of another. Section 13th limits this right, by requiring that the circumstances, to justify the killing, must be sufficient to excite the fears of a reasonable man; and that the party killing, really acted under the influence of these fears, and not in the spirit of revenge; and the 15th section still further restricts the right, by providing that the danger should be so urgent and pressing, at the time of the killing, that, in order to save his own life the killing of the other was absolutely necessary.

Either this is the true exposition of the three sections taken together, and they should not, therefore, be separated; or else the 15th section applies to a different class of cases than the one contemplated in the 12th; and we are not prepared to say that the latter would not be the sounder interpretation.

Was there any evidence, then, which entitled the de-

fendant to have the 12th and 13th sections given in charge by the Court to the jury?

It is in proof, that Reese went to the house of Yarborough, the night on which he was killed, with his bosom boiling with hate toward Keener, and breathing forth threats of revenge, should he encounter him. He finds him in the bed-room of the miserable mistress of the brothel; he kicked furiously at the door; he jobbed at the window with his knife, the blade of which was six inches long; he called out to Jane Yarborough, "Show up your Keener, I want to cut his damned throat." Keener dresses, and comes out upon the piazza, armed with a cane and pistol; Reese walked out on the piazza and asked for a pistol; he then seated himself on a bench, with folded arms. Reese called Keener "a damned, cowardly, pusillanimous son of a bitch"; Keener asked him to repeat it; he did so; daring Keener to point his pistol at him, making at the same time, a motion with his arm; Keener fired, and Reese fell; he was shot in the abdomen; and from the direction of the balls, Reese must have been in a rising attitude, or sitting and bending over, when the wound was received.

We ask not whether this proof is sufficient to justify Keener in killing Reese, or even to reduce the homicide to manslaughter. That is not the question. Is there *no evidence* which tends to show that Reese intended, by surprise or violence, to commit a felony upon the person of Keener? or, at any rate, that the circumstances were sufficient to excite the fears of a reasonable man, that such was the intention of Reese?

Without expressing or intimating the slightest opinion as to the sufficiency of the testimony, we are unanimously of the opinion that the facts which have been detailed, in connection with others in the record, were such as to have entitled the accused to the consideration, by the jury, of the law upon which he rested his defence; and, consequently, that it was error in the Court to refuse to give this law in charge to the jury, when requested to do so by prisoner's counsel.

The presiding judge instructed the jury, very properly, to enquire whether the homicide was murder, voluntary manslaughter, or done in self-defence, and read to the jury the law defining each; and assigned as a reason the facts disclosed by Emma Burns and Dr. Felder. Why was not *all the law* respecting voluntary manslaughter and justifiable homicide given in charge? How could it be said that there was evidence to authorize the reading of the 15th section, but none which was applicable to the 12th and 13th sections; and that, too, when it is admitted that stronger proof is necessary to acquit under the 15th, than under the 12th and 13th sections? If the evidence referred to by the Court *tended* to establish the defence of the prisoner, under the 15th section—(and if it did not, why was it read?)—why did it not likewise tend to the same purpose under the 12th and 13th sections? The jury who were sworn to try this traverse, had a right to find their verdict upon their own convictions and consciences; for, as was very pertinently said by Chief Justice VAUGHAN in Bushell's case, Vaughan's R., 148, "A man cannot see by another's eye, nor hear by another's ear. No more can a man conclude or infer the thing to be resolved by another's understanding or reasoning,." He continues: "Upon all general issues, as upon not culpable pleaded, the jury find upon the issue to be tried, wherein they resolve both law and fact complicately, and not the fact itself; so as they answer not simply to the question, what is the law? Yet, they determine the law in all matters where issue is joined and tried." Ibid. 150.

Said Chief Justice PARSONS, in Coffin v. Coffin, 4 Mass. R. 25, "the issue involves both law and fact, and the jury must decide both the law and fact. To enable them to settle the fact, they must weigh the testimony; that they may truly decide the law, they are entitled to the assistance of the judge." How to the "assistance?" By withholding from them the law upon which the prisoner professedly grounds his defence? No; nor by having it read, and then taking the law, implicitly and without.

questioning, from the Court; otherwise, the verdict is not *theirs*, but in part only; and general verdicts should be abrogated, and special verdicts revived. They should find the *naked* fact instead of the *criminal* fact. It follows, demonstrably, then, under our Code, that to make a *whole* verdict, a *legal* verdict, the jury must find the conclusion of *law* upon the *facts*; and notwithstanding it is their privilege, as well as their duty, to receive "assistance" from the Court, still, the conclusion of *law* upon the facts, must be the result of their own conviction and understanding.

If the power thus committed to the jury be exercised against the opinion of the Court to convict, the remedy is with the Court to set aside the verdict and award a new trial. If used to acquit, it must be an extreme case; and, although contrary to law, is rarely tainted with corruption. It is produced, generally, by a liberal interpretation of the law, in favor of liberty and life.

In connection with the topics already discussed, the Court was requested by counsel for prisoner, to charge the jury—

1st. "That, if they believed, from the evidence, that prisoner, at the time of the commission of the act, was under the fears of a reasonable man, that the deceased was manifestly intending to commit a personal injury upon him amounting to felony, the killing was justifiable homicide."

This charge the Court refused to give. And wherefore? Is it not in exact accordance with the terms of code?

2d. "That if they believed, from the evidence, that prisoner was under similar fears of some act of violence and injury, less than a felony, his offence was manslaughter."

This request was likewise refused; and, although not in the Code, in so many words, it would seem to be a necessary corollary from the sections we have been considering. Indeed, it is a familiar principle, and one scattered everywhere, in works on criminal pleading.

“Neither can a man,” says Hawkins, “justify the killing another in defence of his house or goods, or even of his person, from a bare private trespass; and, therefore, he that kills another, who, claiming a title to his house, attempts to enter it by force or shoots at it, or that breaks open his windows, in order to arrest him, or persists in breaking his hedges after he is forbidden, is guilty of manslaughter.’ 1 Hawkins’ Pleas of the Crown, 372.

The requests being legal, and refused, the judgment complained of upon these points, must be reversed.

* * * * *

New trial granted

HOLLER v. THE STATE.

[37 IND., 57.]

Supreme Court of Judicature of Indiana, November Term, 1871.

JAMES L. WORDEN, <i>Chief Justice.</i>	} <i>Judges.</i>
SAMUEL H. BUSKIRK,	
JOHN PETTIT,	
ALEXANDER C. DOWNEY,	

HOMICIDE—THREATS, COMMUNICATED AND UNCOMMUNICATED.

1. On a trial for murder, in which the defendant’s witnesses had testified that the deceased had a bowie-knife in his possession at the time of the killing, and the State had introduced evidence to the effect that he did not have or own any such knife; *held*, that it was competent to prove that the deceased, within two days of the killing, exhibited a bowie-knife, and said he intended to take the defendant’s life with it; and that it was competent to prove threats made by the deceased against the defendant, either when exhibiting the knife or at other times, and whether such threats had been communicated to the defendant previous to the fatal meeting or not. [See Sloan’s case, *ante*, p. 516, and references.]

2. The rule of *Cornelius v. Commonwealth*, 15 B. Monr., 539, recognized, that where evidence of communicated threats has been admitted, it is competent, for the purpose of corroborating such evidence, to introduce evidence of uncommunicated threats.

Appeal from Wayne Criminal Court. *W. A. Pelle* and *H. C. Fox*, for appellant; *B. W. Hanna*, Attorney-General, for the State.

DOWNEY, J., delivered the opinion of the Court:

The appellant was indicted with his brother, for murder in the first degree, in killing one Nathaniel Tibbetts, on the 17th day of October, 1864, in Wayne county.

He was tried at the October term, 1871, found guilty of manslaughter, and his punishment fixed at ten years imprisonment in the State prison. He moved for a new trial, for the reason, among others, that the Court had improperly excluded certain evidence offered by him; that the Court had misdirected the jury, and had improperly refused to instruct the jury as prayed for by him; that the verdict of the jury was contrary to law, and not sustained by the evidence. This motion was overruled by the Court, and judgment was rendered against the defendant upon the verdict.

The evidence, and also the instructions, are set out in bills of exceptions in the record. There are twelve alleged errors assigned, all of which, with one exception, are simply reasons for which the Court might have granted a new trial, if deemed sufficient. Only one, that is the second, which alleges that the Court erred in overruling the defendant's motion for a new trial, raises any question for our consideration. This assignment requires us to examine the reasons urged in the Criminal Court for a new trial, which we proceed to do.

The State's theory of the case, as developed by her evidence, was, that the deceased and his sons, Jacob and William, at about seven o'clock in the evening, were at the store of Lyner, in the town of Abington, and started to go home. The defendant was sitting in front of the store on a horse-block. Afterward, his brother, Granville, joined him. When the deceased and his sons got part of the way home, and near an alley and barn, the defendant and his brother came out around the barn, and the defendant said to the deceased, "Tibbetts,

God damn you, what did you strike me the other night for?" Deceased spoke, and said, "Francis, I thought you were injuring my boy, or I should not have struck you." The deceased stepped on about two steps, when defendant said, "God damn you, I'll show you," and drew up and hit him with a rock. The defendant was within about two steps when he threw at him. When defendant threw the stone, Granville Holler said to Jacob Tibbetts, "God damn you, don't you interfere;" and as Jacob went on towards home, he threw stones at him. The stone thrown at the deceased, struck him on the back part of the left side of his head, and he immediately fell to the ground. The defendant went up to him and stood over him after he fell. The other son ran home. The deceased was carried to his home in an unconscious condition, and died from the effects of the injury, at four o'clock the next morning. The stone thrown, and which struck the deceased, would have weighed two pounds.

The defendant's theory of the case, as testified by his brother, supported, perhaps, to some extent by others, was that the deceased came to the barn, where he and his brother were, and where they or one of them kept a horse, or horses, accompanied by his two sons. The deceased said, "Here is the son of a bitch now." The defendant said "Why do you jump on me now, when you and your crowd jumped on me the other night, and beat me up?" The deceased said, "I'll settle that with you, and that pretty damned quick," and drew a bowie-knife from his person. The defendant said, "Tibbetts, you are not going to strike me with that knife, are you?" Tibbetts said, "Yes, I'll cut your damned guts out of you." As he said this, he advanced two or three steps towards the defendant, and then halted. He motioned with his hands, and said, "Come up, Jake." While his head was turned, the defendant stooped and picked up the stone, and threw it at the deceased, knocking him down. He was eight or ten feet from the defendant when the stone was thrown. The defendant did not advance towards the deceased. Jacob Tibbetts, when his father called to him

to come up, had a revolver in his hand, which he drew from his belt. These opposite statements of the facts are taken from the testimony of the principal witness on each side of the case.

Two or three days before the killing of the deceased by the defendant, a difficulty had taken place, in which the deceased had beaten the defendant with a gun-swab; and this was the occurrence referred to in the conversation between the parties, at the time of the killing.

It was testified, that, after this affair, and, of course, before the killing of Tibbetts, he made threats of further violence towards the defendant, which had been communicated to the defendant.

It became a question on the trial, whether or not the deceased had a bowie-knife at the time when he was killed. His son had testified that he had not, and that he did not own any such knife.

The defendant offered to prove by Isaac Hunt, a competent witness, that between the time of beating with the gun-swab and the time of killing the deceased, the witness saw the deceased have a bowie-knife, with a blade six or eight inches long, and that he said at the time, that he intended to kill the defendant with it. This evidence, both as to the possession of the knife, and as to the declaration or threat of the deceased, was excluded by the Court. He offered to prove the same facts by Reuben Robbins, with reference to the possession of the knife by the deceased, and his threats as to what he intended to do with it. This evidence was also excluded.

He proposed to prove by other witnesses, threats of violence to the defendant, made by the deceased, not connected with the possession and exhibition of the knife, within two or three days previous to the killing, which were also excluded. To all of these rulings there were proper exceptions.

It was not shown that these threats of the deceased were communicated to the defendant before the killing,

and it was on this ground, we presume, that the learned Judge who presided at the trial, excluded the evidence. We infer that this was the ground of the exclusion, for the reason that such threats as had been communicated to the defendant, were admitted in evidence.

As the defendant's witness had testified, that the deceased, on the night when he was killed, had a bowie-knife, and the State insisted that he had not, we think the possession of such a knife by the deceased, so shortly before the occurrence, was proper evidence to go to the jury; and as to the threats made, both when the knife was produced and when it was not, we think they were admissible in evidence, without reference to whether they had or had not been communicated to the defendant. If the defendant had made previous threats of killing the deceased, it is very clear that they would have been admissible in evidence, and we cannot see any good reason why the threats of the deceased against the defendant, are not also competent evidence.

In *Cornelius v. Commonwealth*,* 15 B. Monr., 539, "in a trial of a prisoner, charged with murder, he proved threats on the part of the person killed, to kill him, which threats had been communicated to the prisoner. He then offered to prove other threats, not communicated, which the Court refused to admit. Held by the Court of Appeals, that it was error to exclude such

* *Cornelius v. Commonwealth*, 15 B. Monroe, 539. Extract from the opinion of the Court, delivered by SAMPSON, J.: "The prisoner introduced testimony to prove that Hopson, the man he had killed, had, a short time previously, made threats against him, and had tried to hire persons to kill him, which facts had been communicated to him before he killed Hopson. He then offered to prove by other witnesses, that Hopson had threatened to kill him, which threats were made by him a few days before he was killed, but were not communicated to the prisoner, and on this ground were excluded by the court.

"We think that this testimony should, under the circumstances in this case, have been admitted. It tended to confirm the other evidence, that Hopson had made threats against the prisoner, and to counteract a presumption of fabrication, by the witnesses who gave that testimony. Besides, Hopson's intention to make an attack on the accused, was an important matter, as well as the belief of the existence of such an intention on the part of the prisoner."

proof; its tendency was to confirm the proof of the threats already proved, and to show the intention of the deceased to attack the prisoner."

In *Campbell v. The People*,^b 16 Ill., 18, upon the trial, the defence offered to prove that on that day, and at other times, shortly before his death, the deceased had made threats against the prisoner. This evidence the Court ruled out, and an exception was taken. The Supreme Court say: "In this, the Court unquestionably erred, although they may never have come to the knowledge of the defendant till after the homicide was committed. If the deceased had made threats against the defendant, it would be a reasonable inference that he sought him for the purpose of executing those threats, and thus they would serve to characterize his conduct towards the prisoner at the time of their meeting, and of the affray. If he had threatened to kill, maim, or dangerously beat the defendant, it would be a fair inference, especially so long as the evidence shows that he had a hatchet in his hands, that he had attempted to accomplish his declared purpose, and if so, then the prisoner was justified in defending himself, even to the taking of the life of his assailant, if necessary. While the threats, of themselves, could not have justified the prisoner in assailing and killing the deceased, they might have been of the utmost importance in connection with the other testimony, in making out a case of necessary self-defence. The evidence offered was proper, and should not have been omitted."

In *Keener v. The State of Georgia*,^c 18 Ga., 194, Reese, the deceased, had made threats against the defendant, to one Cosby, who was called as a witness. The testimony was rejected, mainly on the ground that the threats had not been communicated to the defendant prior to the killing of the deceased. In the opinion of the Court, delivered by LUMPKIN, J., they say:

[Here the learned Judge quoted at length from that

^b *Ante*, p. 262. ^c *Ante*, last case.

part of the opinion in Keener's case, which relates to the rejection of the testimony of the witness, Cosby, *ante*, pp. 550–56. He then continued, as follows :]

In *Stewart v. the State*,⁴ 19 Ohio, 302, it was held “competent for the defendant to prove that the person alleged to have been murdered, and others, had agreed to go to the house where the defendant boarded, for the purpose of quarreling with him, and that they had approached him with that intent at the time the affray commenced, which resulted in the homicide; and to prove the conversation of the parties in relation to such agreement, though the defendant had not been informed of the intent of the parties in approaching him.”

In *Dukes v. the State*, 11 Ind., 557, this Court say: “As a general rule, it is the character of the living—the defendant on the trial for the commission of the crime—and not of the person on whom the crime was committed, that is in issue, and as to which, therefore, that evidence is admissible. But in a case like the present, when the question arises, whether the accused acted in the commission of the homicide, upon grounds that justify him in the deed, it would seem that the character of the deceased, might be a circumstance to be taken into consideration. Especially might this be the case, where the accused knew that character, and also knew, at the time, the individual by whom the attack upon him or his property was made.” The Court add: “Where, as in this case, these facts may not have been known, we do not see how the evidence could be entitled to much weight.”

In this case, according to the report, it was evidence of the character of the deceased, offered by the State, of which the Court was speaking, and not evidence of threat.⁵

⁴ *Ante*, p. 191.

⁵ The citation of Duke's case, is hence, not quite relevant here. Besides, it was reversed on the grounds that the indictment was fatally defective; and hence, so far as it undertakes to decide other questions, it has not, in a strict sense, the force of authority; although the above language has been

[The Court then considered a question relating to the impeachment of a witness, and concluded as follows:]

There are many other points made to show that a new trial should have been granted, but we need not examine more of them.

The judgment is reversed, and the cause remanded for further proceedings, and the clerk is directed to certify to the warden of the State prison, to return the prisoner to the jail of Wayne county.

Judgment reversed.

quoted with approbation in many cases. The following is that part of the opinion in full, which relates to the law of self-defence:

Dukes v. State, 11 Ind., 557. Supreme Court of Indiana, November term, 1858. Extract from the opinion of the Court, by PERKINS, J.: * *

The State was permitted to give evidence of the character of the deceased, White.

As a general rule, it is the character of the living—the defendant, on trial for the commission of crime—and not of the person on whom the crime was committed, that is in issue, and as to which, therefore, that evidence is admissible. But in a case like the present, where the question arises, whether the accused acted, in the commission of a homicide, upon grounds that justify him in the deed, it would seem that the character of the deceased might be a circumstance to be taken into consideration. Especially might this be the case when the accused knew that character, and also knew, at the time, the individual by whom the attack upon him or his property was made. See 3 Greenl. Ev., pp. 27, 28, and note.

Where, as in this case, these facts could not have been known, we do not see how the evidence could be entitled to much weight.

Some other evidence was offered and rejected, to which rejection the defendant excepted. A brief statement of the facts of the case, will aid in understanding the bearing upon it of these rulings of the Court.

On the night of the 20th and 21st of July, 1858, at about two o'clock, Samuel Dukes, the appellant, was aroused from sleep and his bed, by noises about his dwelling. Rumors of a threatened attack upon it had previously reached him. It was a house of but one story, and three rooms with a porch. In the back room was an unopened barrel of whiskey. Getting up from his bed, he attempted to open the door of his room and go out, but found it fastened upon the other side, so that it could not be opened. He then got his gun, raised the window, and discerning from it, upon the porch, some object, the character of which, owing to the darkness, he could not determine, he aimed his musket at it and fired. The object disappeared. Dukes went to work, forced open his door, and got out. He found that the back room had been broken open, entered, and the head of the whiskey barrel knocked in with an axe; and that the doors leading out of the other two rooms of the house, in which the family of Dukes were, had been fastened with ropes to prevent their egress from the house or en-

h—nce into the back room which was broken open. Soon afterwards, intelligence came to Dukes that the unknown object upon his porch, at which he had aimed his musket, was John G. White; that the charge of shot with which it was loaded, had entered his abdomen, and that he was mortally wounded. White, on being wounded, had hastened to his lodgings, informed his bed-fellow that Sam. Dukes had shot him, but had given no explanation of the circumstances, nor did he afterwards, and in a few hours he died.

Dukes was indicted for the murder of White. On the trial, the State proved by Mrs. Smith, a sister-in-law of Dukes, who, on account of the absence from home that night of her husband, was lodging at the house of Dukes, and was sleeping in the same room in which Dukes slept, and from which he shot White, that immediately upon the discharge of the gun she called to Mrs. Dukes, then in her husband's bed in the room, to light the candle, which was standing at the head of her bed; that she at once did so, but that Dukes directed her to blow it out. The defendant then asked the witness to state the reason assigned by Dukes for the extinguishment of the light; and also to state his appearance, manner, and condition of mind, as indicating alarm or otherwise, and the efforts made by him to sound an alarm to the public; but the Court refused to allow the witness to answer. We think the question related to a part of the *res gestæ*, and of one conversation touching the subject matter, and should have been answered.

The defendant introduced upon the trial, as a witness, Andrew Dame, who testified that there existed in the village of Colfax, the place where the homicide was committed, a secret society called the "Good Templars;" that the deceased, White, was a member of that society; and then proposed to prove, by the witness, that in a meeting thereof, a short time before the attack upon Dukes' house, in which White was shot, the latter had made threats against Dukes, and had said that Sam. Dukes should stop selling liquor or lose his life, or he, White, would lose his; but the Court would not allow the proof to be made.

It is a general proposition of law,—“it is justly called the primary law of nature”—that if a “party himself, or any of his relations; viz., husband and wife, parent and child, master and servant, be forcibly attacked in his person or property, it is lawful for him to repel force by force.” “But care must be taken that the resistance does not exceed the bounds of mere defence and prevention.” 3 Bla. Com., 3.

And, when a party has assumed to act in the exercise of this right of self-defence, and is prosecuted therefor, we take it that it is competent for him to give in evidence, any facts tending to show the character of the attack which he resisted, the intention with which it was made, and that he had reasonable grounds to believe that it was necessary, as a means of prevention, to go to the extent he did, in resisting it. 2 Wat. Arch., 225 *et seq.* That the threats proposed to be proved, constituted such a fact, in this case, we cannot entertain a doubt. The circumstance that they were made at a meeting of a secret society to the members thereof, instead of weakening, rather increased their force as evidence for the defendant. It tended to prove a secret conspiracy to sustain the threatened attack by numbers. The fact of such a conspiracy he had a right to enquire into, and if it existed, went far in justification of the act done.

For the errors already noticed, the judgment must be reversed. We can not say that they may not have operated injuriously to the defendant.

* * * * * Judgment reversed.

PITMAN v. THE STATE.

[22 ARK., 354.]

Supreme Court of Arkansas, October Term, 1860.

ELBERT H. ENGLISH, *Chief Justice.*

FREEMAN W. COMPTON, } *Associate Justices.*
HULBERT F. FAIRCHILD, }

HOMICIDE—UNCOMMUNICATED THREATS.

On the trial of an indictment for murder, threats and declarations of hostile purpose and feeling, made by the deceased on the day and near the time of the killing, and his acts and conduct indicative of an intention to execute such threats, are admissible in evidence, as parts of the *res gestæ*, though the threats were not communicated to the defendant. [Acc. Sloan's case, *ante*, p. 516. and references.]

Error to Sebastian Circuit Court. Hon. J. M. WILSON, Circuit Judge.

Vandever & G. J. Clarke, for plaintiff in error; *J. L. Hollowell*, Attorney-General, for the State:

Threats, uncommunicated to the defendant, are not admissible in evidence in his defence. *Coker v. State*, 20 Ark., 55 [*infra*]; *Atkins v. State*, 16 Ark., 584 [*infra*].

ENGLISH, Ch. J., delivered the opinion of the Court:

Jacob Pitman was convicted in the Sebastian Circuit Court on an indictment for murdering Blake Thompson, and sentenced to the penitentiary for fifteen years. A new trial was refused him, and he appealed. His counsel insist that the judgment should be reversed, because of the exclusion of the testimony of Weir and Knowles; and this is the only question presented by the record that need be noticed.

In order to understand the materiality and relevancy of the facts proposed to be proven by these witnesses, it is necessary to state the substance of the testimony introduced upon the trial.

Pitman resided in the town of Greenwood, and kept a boarding-house; and Thompson and wife, (or a woman kept by him as such), had been boarding with him. A short time before the killing, which occurred on the 3d of June, 1859, Thompson left Pitman's and went to the house of one Tatum, who resided about two miles from Greenwood.

Three days prior to that on which the fatal meeting between the parties took place, Pitman went to Tatum's to see Thompson about a debt which he owed him, and finding Thompson absent, made to persons there, offensive remarks about him and his wife, which were communicated to Thompson the next day, on his return; whereupon he made declarations impeaching the honesty of Pitman and the chastity of his wife. These declarations were made known to Pitman on the morning of the 3d of June; whereupon, he procured a double-barrel shot gun, went to the woods, shot it off, charged it with buck-shot, returned to town, looked into several houses, as if he was hunting some one, and then took his seat on the porch of the store-house of T. & W. Kersey. It was also proven that Thompson had made threats against Pitman, which had been communicated to him. In the meantime, Thompson had come into town, wearing upon his person, a pistol—one of Colt's repeaters—and being advised of Pitman's hostile conduct, he went into a store connected with Head's Hotel, procured a double-barreled shot gun, put fresh caps upon its tubes, came out into the street, walked a few steps, halted, raised his head and looked about as though he was looking for some one, then walked up the street in the direction of the porch where Pitman was, carrying his gun by his side, in his right hand, with the muzzle down. When he had advanced to within some forty yards of Pitman, he stopped and looked up, and Pitman threw his gun

over, fired, and Thompson fell. While Pitman was in the act of bringing his gun over to fire, Thompson threw up his gun and sprung to the left, as if to shelter himself behind the old court-house.

Thompson's character was that of a desperado; he had the reputation of having killed several men, and of being a dangerous man.

Pitman proposed to prove by the witness, Weir, "that he saw Thompson about half a mile from Greenwood, on the morning of the killing, on his way to Greenwood; that he had a large Colt's navy revolver, and procured of witness, powder, balls and caps to load the pistol with, and did load her. That he told witness at the time, that he had been in Greenwood the day before, and kept old Jake Pitman, God damn his soul, housed all day, and that he was on his way then to Greenwood, and if he got sight of Pitman, he would be God damned if he did not kill him as quick as he would a rattlesnake."

But the Court refused to permit such proof to be made, unless it was first proven that the same had been communicated to Pitman before the killing.

Pitman proposed to prove by the witness, Knowles, "that he had, just a few minutes before the killing, met Thompson in Greenwood, on his way down to Head's, between McCord's grocery and Head's, and that he said to witness that he had just passed Jake Pitman at McCord's grocery, and that he, Pitman, had a double-barreled shot gun in his hand; and that he, Thompson, was going down to Head's to get him a double-barreled shot gun, and that he intended to return immediately and shoot Pitman down like a dog, God damn him."

But the Court refused to permit such statements and threats of Thompson to be introduced, unless it was first proved that they had been communicated to Pitman before the killing.

In *Atkins v. The State*,^a 16 Ark., 584, it was held that

^a Extract from the opinion of the Court in *Atkins' case*, delivered by ENGLISH, Ch. J.: * * * "The defendant offered to read in evidence,

proof of threats made by the deceased some four or five days before the killing, and not communicated to the accused, was inadmissible.

So, in *Coker v. the State*, 20 Ark., 55, the threats were made some months before the killing, and not communicated, and it was held, that evidence of the threats was properly excluded. Threats, when communicated, are admissible in evidence, as tending to show, that, in the assault on the deceased, the slayer may have acted under a just fear of danger to his own life; but when not communicated, it cannot be supposed that he acted in reference to the threats in making the assault, or that

the testimony of Richard Harvey, taken in his behalf, before the examining court, the witness being dead. The Court, on the objection of the State, excluded so much of the deposition of Harvey as related to threats made by the deceased against the prisoner; and he excepted.

“On looking into the statement of Harvey, which is set out in the bill of exceptions, it appears that he testified before the examining court, as follow:

“‘I heard Wicker, the deceased, say, that he had his knife ground for Atkins. He then asked if Atkins did not have some hogs at Jackson Wicker’s? I replied, I did not know; and he said he had his knife whetted or scoured, but which, I do not recollect. * * * * *

“‘Wicker had a decanter of whiskey, and asked me to drink. I then told him that my business was to make up a school. He then asked me if Atkins was going to send to school? I replied, I did not know. It was then that Wicker said: “I have my knife ground for Atkins.” Wicker said he believed Atkins was a *Murrell* man. This was some four or five days before Wicker was killed, or it might have been a week. This conversation occurred at Russell’s old mill.” *Cross-examined by the State.* “Walker came to the mill with me. When we got to the mill, we found Cook and Thomas Wicker, and several other gentlemen, I did not know. I never had seen Wicker before to know him. Wicker asked me and the other gentlemen to drink. I do not know whether the conversation about the knife was before or after we took the drink. I do not recollect whether any one else was present at the time when we had the conversation or not. I never informed Atkins of this conversation.’

“It will be observed, that the conversation in which these threats were made, (if deemed such), occurred between the deceased and the witness, That he could not state that any one else was present when the conversation took place, and that he never communicated the threats to the prisoner.”

The learned Judge then reviewed at length *Powell v. The State*, *post*, p. 587, note, and *Hudgins v. The State*, *ante*, p. 470, note, and also cited Goodrich’s case, *ante*, p. 532, and concluded that the testimony was not admissible.

they in any way influenced his conduct. It was upon this reasoning that the rule was placed in *Powell v. State*, 19, Ala., 577, which was quoted with approbation in *Atkins v. State*, but the learned judge, who delivered the opinion in the case referred to, said, "We will not undertake to say, that no case could occur in which such threats, although unknown to the prisoner, might be admissible," etc.^b

^b Coker's case contains one or two other points of interest, aside from its ruling upon the question of uncommunicated threats. We shall, therefore, digress so far as to quote fully that portion of the opinion of the Court which relates to the law of self-defence.

ENGLISH, Ch. J. :—Calvin Coker was indicted in the Marion Circuit Court for the murder of Matthew Owens; upon his application, the venue was changed to White county, where he was tried, on the plea of not guilty, convicted of murder in the second degree, and sentenced to the penitentiary for seven years. He moved for a new trial, which was refused, and he excepted, and appealed to this Court.

The grounds of the motion for a new trial, will be considered in the order in which they appear upon the record.

1. The Court excluded from the jury, part of the testimony of Dixon C. Williams.

Williams testified, among other things, that he had a conversation with Owens, on the way to his house, some months before he was killed, in which Owens told him, that he believed that Bill Coker, old Joe Coker and *Calvin Coker* had conspired against him, because he would not succumb to them; but if they ever came in collision with him, he would get one or two of them while they were getting him, etc. That after witness and Owens got to the house, "*Owens showed him a pistol, and asked him if he did not think that would do to take them. He said it was sure fire—a dead shot.*"

It seems that Williams communicated to Calvin Coker, before the killing, what Owens said to him on their way to the house, and the Court permitted that to go to the jury, but excluded so much of Williams' testimony as related to what Owens said to him about the pistol, etc., after they got to the house; because it was not communicated to Coker by the witness, before the killing. The ruling of the Court on this point was in accordance with the decision of this Court, in *Atkins v. The State*, 16 Ark., 584.

* * * * *

4. On motion of the attorney for the State, the Court instructed the jury as follows, against the objection of the prisoner :

1. "If the jury find from the evidence, that the defendant armed himself with a deadly weapon, or being armed with a deadly weapon, provoked the deceased, by insulting words, to resentment, without the use of a deadly weapon, intending to slay him, and did slay him under the pretence of self-defence, the killing is regarded, by law, as murder in the first degree.

We think the proposed testimony of Weir and Knowles was erroneously excluded, and that its admission would have been no departure from the rule, under which the threats were excluded in Atkins' case.

It was certainly competent for Weir to prove that he saw Thompson on the morning of the killing; that he was on his way to Greenwood; that he had one of Colt's large navy revolvers; that he procured powder, balls, and caps from witness to load the pistol, and did load it;

2. "If they believe, from the evidence, that the deceased was unarmed, and that the defendant used a knife, which was a deadly weapon, no threats made by the deceased before the homicide will excuse the offence, or reduce it to manslaughter if the combat was sought or willingly entered into by the defendant."

In connection with these instructions, the Court also gave, at the request of the prisoner, the following :

"1. If the jury find from the evidence, that the defendant was attacked in such manner and under such circumstances, as to furnish reasonable ground for apprehending a design to take his life, or to do him some great bodily harm, and that there was reasonable ground for apprehending a design to take away his life, or to do him some great bodily harm, and there was reasonable ground for believing the danger imminent, that such design would be accomplished, they should find for the defendant.

"2. If the jury find from the evidence, the deceased had made threats against the life of the defendant, and that these threats had been communicated to defendant before the killing, and that the deceased made a demonstration in such manner, or under such circumstances, as to furnish the belief that there was a design to take away his life, or do him great bodily harm, and that there was reasonable ground to believe the danger imminent that such design would be accomplished, and that the defendant killed Owens, it, in law, would be justifiable homicide, and they should find for the defendant."

Perhaps a killing under the circumstances supposed in the first special instruction given for the State, might be murder in the first degree, and, perhaps, there were some features of the testimony that warranted the giving of the instruction; but neither of these points need be positively decided, as the appellant was acquitted of murder in the first degree, and was, therefore, not prejudiced by the instruction.

The second special instruction, given at the instance of the State, is unobjectionable, especially when considered in connection with the second instruction given on behalf of the appellant.

5, 6 and 7. The *fifth*, *sixth* and *seventh* grounds of the motion for a new trial, are substantially the same—that the verdict was contrary to law and evidence.

Upon this point, the argument of the counsel for the appellant is silent.

The testimony conduces to show that Coker and Owens differed about

and we think the declarations made by him, in connection with the facts, manifesting the motive that was taking him to Greenwood, his hostile feelings toward Pitman, the use he intended to make of the pistol, etc., made, as they were, on the very morning of the killing, were admissible as part of the *res gestæ*. State v. Goodrich,^c 19 Vermt., 119.

So, we think the declaration made by Thompson to Knowles, a few minutes before the killing, while on his way to Head's, (where other witnesses proved that he got

some change. Owens insisting that he had given Coker \$2 50, by mistake, in making change, which Coker denied. Owens sued Coker for the amount in controversy before a justice of the peace. The parties met at De Buque, on the 7th of February, 1857, for trial. After one witness had given his testimony, it was mutually agreed that the case should be submitted to the justice, upon the statements of the parties. Whilst Owens was making his statement, Coker intimated that he was swearing falsely. The parties differing in their versions of the matter, the magistrate stated, that he would take the case under advisement. Coker then went out of the justice's office, and returned with some liquor in a tin dipper, and passed it round to the company, offering it to Owens, perhaps, who declined to drink. Coker then sat down at the fire, by the side of Owens, and said to him that he had sworn to what he would not swear, for Marion county. Owens replied, that he had sworn it, and would swear it again. To which Coker responded, that if he did, he would swear a damned lie; whereupon Owens arose, saying he could stand it no longer. Coker arose at the same time, and they caught each other by the hands. A brother of Owens took hold of him, and pushed him back into one corner of the room; the magistrate, at the same time, taking hold of Coker, and shoving him back to the door, some eight or ten feet from Owens. Coker then drew a bowie-knife, broke loose from the magistrate, rushed on Owens, and thrust his knife into his bosom, giving him a mortal wound, of which he very soon died. Some of the witnesses say, that whilst the magistrate held Coker back at the door, Owens pulled off his blanket overcoat, and dropped it down by him. None of the witnesses testify that he made any attempt to use a weapon, if he had any about him. They found none upon his person when he was stripped, after he was killed.

One witness swore that he gave him a pistol before the trial, and slipped in and took it out of his overcoat pocket immediately after he was stabbed. The above is the substance of the facts connected with the killing, as stated by most of the witnesses. One or two witnesses make a more favorable version of the facts for the prisoner.

Upon all the facts of the case, the conclusion is inevitable that there was no want of testimony to sustain the verdict. * * * The judgment of the court below is *affirmed*.

^c Ante, p. 532.

the gun, and put fresh caps on it), that he had just passed Pitman; that he was armed with a shot-gun, and that he, Thompson, was going to Head's to get a gun, and intended to return immediately and shoot Pitman, etc., were admissible as part of the *res gestæ*.

It was certainly competent to prove the conduct of Thompson, as well as of Pitman, immediately preceding the killing, and the declarations made by him, expressive of his feelings, and the motives and intentions which were prompting his acts, were admissible as part of the *res gestæ*. *Campbell v. the People*,⁴ 16 Ill., 19; 1 Greenlf. Ev., § 108.

If the testimony of Weir and Knowles had been admitted, it might, in the estimation of the jury, have tended to show what the purpose of Thompson was, when he went into the street armed, and walked in the direction of the place where Pitman was—whether he intended to make an attack on Pitman, or act on the defensive; and we can not say, that, if the excluded testimony had been admitted, it would have had no influence on the minds of the jury in making up their verdict.

It is true that the declarations of Thompson, in question, were not communicated to Pitman, but we put their admissibility upon the ground that they were of the *res gestæ*—tending to explain the conduct and motives of the deceased just before the killing; and if they conduced to prove that he did go into the street and advanced towards Pitman with the intention of making the attack, and not of acting on the defensive, it is not unreasonable to suppose that Pitman may have seen some indication of his intention in his appearance, or in the manner in which he demeaned himself in approaching.

We pass no opinion upon the sufficiency of the evidence introduced to support the verdict, but we reverse the judgment for the reason only that we think the excluded testimony should have gone to the jury for what

⁴ *Ante*, p. 262.

it was worth, and we cannot say that it would have had no influence upon the result of the trial.

The cause must be remanded for a new trial.

Judgment reversed.

DUPREE v THE STATE.

[33 ALA. 380.]

Supreme Court of Alabama, January Term, 1859.

A. J. WALKER, *Chief Justice.*

GEO. W. STONE,
RICHARD W. WALKER, } *Associate Justices.*

HOMICIDE—COMMUNICATED THREATS—CONDUCT OF DECEASED TOWARD SERVANT OF PRISONER—MODE OF PROVING CHARACTER OF DECEASED PERSON—CHARACTER OF PRISONER, AND COMPETENCY OF WITNESSES TO TESTIFY AS TO—INSTRUCTIONS ON THE LAW OF SELF-DEFENCE.

1. Threats made by the deceased a short time before the commission of the homicide, indicating an angry and revengeful spirit towards the prisoner, and a determination to do violence towards his person, which were communicated to the prisoner before the homicide, are evidence for him. [Acc. Monroe's case, *ante*, p. 442, and note; Pridgen's case, *ante*, p. 416; Robert Jackson's case, *ante*, p. 476; Sloan's case, *ante*, p. 516; Keene's case, *ante*, p. 531, note; Carroll's case, *post*; and many others.]

2. The conduct of the deceased, in going to the prisoner's premises, several weeks before the commission of the homicide, and there seeking a personal difficulty with a person who was in the employment of the prisoner, is not admissible evidence for the prisoner. [Acc. Robert Jackson's case, *ante*, p. 486; People v. Henderson, 28 Cal., 469; Harmon v. The State, 3 Head, 243.]

3. The bad character of the deceased cannot be established by proof of particular facts, or offences against the law, unconnected with the case; as that he was an escaped convict from the penitentiary of another State. [Acc. Keener's case, *ante*, p. 547, and note c.]

4. The character of the prisoner for peaceable disposition and habits is competent evidence for him.

5. A person who is acquainted with the prisoner's character, and who has known him for eight or ten years, is competent to testify to his char-

acter, although he may have resided more than twenty miles distant from the prisoner's residence.

6. The prisoner, having requested the Court to instruct the jury, "that, if they believed, from the evidence, there was a reasonable belief in his mind of some great personal injury or bodily harm about to be committed on him by the deceased," or "that there was reasonable ground on his part to believe that he was in danger of great bodily harm from the deceased, whether it actually existed or not, then the killing, under the circumstances, would be excusable;" and, the Court having refused to give the charge, "except with the qualification, that, if the danger appeared to be imminent or threatening, the prisoner would be excused,"—*held* that, neither the refusal of the charge asked, nor the qualification added to it was erroneous. [Acc. Harrison's case, *ante*, p. 71; Scott's case, *ante*, p. 163; Dyson's case, *ante* p. 304; Wesley's case, *ante*, p. 319; Evans' case, *ante*, p. 329; Head's case, *ante*, p. 341; Rippy's case, *ante*, p. 345; Williams' case, *ante*, p. 349; Landers' case, *ante*, p. 366; Johnson's case, *ante*, 407. But see Phillips' case, *ante*, p. 383; Carico's case, *ante*, p. 389; Bohannon's case, *ante*, p. 395, and Young's case, *ante*, p. 400, note.]

Indictment for the murder of one Smith. Verdict, manslaughter in the first degree; sentence, imprisonment in the penitentiary for three years.

The only testimony of what took place at the killing, was that of a youth of about sixteen years; that of some younger children having been excluded on account of their being of mixed blood.

This witness was near the prisoner's house on Sunday, and was sitting at a landing under an oak tree, when he heard the cries of a female slave of the prisoner, as if receiving severe punishment. He heard her screams, and the sound of blows, like those of a whip, as he thought, distinctly. He did not count the blows, and was unable to say how many he heard. Just after, or at the time of hearing the blows, he saw the prisoner coming out of his house, with his gun, and running down towards his cabins, from which the noise of the blows and the screams proceeded. The cabins were about fifty or sixty yards from the prisoner's house, and about twenty yards from the river. When the prisoner got within ten or fifteen steps of the cabins, he stopped about half a minute, as witness thought; then raised his gun and fired; put down his gun; then raised it again, and fired it the second time; and then turned and ran towards his house. Af-

ter the prisoner ran, witness saw Smith for the first time, come out from behind the cabins, and run towards the prisoner; but he never got to the place where the prisoner stood when he shot. Smith ran fifteen or twenty yards from the cabin, turned round, and, after walking back some few steps, fell, and said he was a dead man. Witness thought the distance between him and the place where Smith fell, might have been from one hundred and fifty to two hundred yards, but never measured it. He did not see Smith until he ran out from behind the cabin, and heard no words pass between him and the prisoner. He did not see that Smith had either a gun, whip, stick or knife, when he ran towards the prisoner. Immediately after the shooting, witness went near where Smith lay, and then went to tell what had happened. When he returned with some of the neighbors, they found the prisoner there, and a knife, stick and whip were there found. Witness afterwards saw Smith's body under an oak tree; it had been removed three or four steps from where he fell. He had seen Smith before that morning, who appeared to have been drinking; saw him go down to a grog shop, which was about a quarter of a mile below the prisoner's house. There were two cabins on the prisoner's place, about eight yards apart, besides his dwelling; all within his enclosure. This negro woman and her children lived in one of them. These cabins, or one of them, at least, were between witness and Smith.

This was the only testimony as to the killing, but there was other testimony, showing that Smith had been drinking the day he was killed.

The prisoner then introduced one Williams, who testified that he went to the prisoner's lot for some water, on Thursday next before the killing, and there met the deceased; that the deceased told him that the prisoner's folks had been killing his chickens, and that, if the prisoner said a word about it, he would cut his throat; that he remonstrated with the deceased, but that the latter said he would kill the prisoner before he left that place; that he also said, on witness further remonstrat-

ing with him, "Damn Dupree, he would kill him anyhow;" that Dupree was then absent from home; that witness, knowing the violent character of Smith, felt alarmed for Dupree and his family, and, accordingly, went over to his house, on Saturday night before the killing, to warn him of his danger; that Dupree had not returned home when witness got to his house, and witness then determined to remain there all night to protect his family; that witness lived about three miles from the place; that Dupree returned between nine and ten o'clock that night, when witness told him of all these threats, and advised him to get a peace warrant; that the last words spoken by witness to Dupree that night, was to caution him against Smith, whom witness had known for some two or three years, and thought him a quarrelsome and dangerous man, especially when he was drinking. No objection was made to the testimony of this witness at the time it was given; but after the testimony had closed, the Court, on motion of the solicitor for the State, excluded all the testimony of this witness, which related to the threats he had heard the deceased make against the prisoner, his household and family, although they had been communicated by the witness to the prisoner; and to this ruling, the prisoner excepted.

The prisoner offered to prove by a witness named Ladd, that he had heard Smith, on the day before the killing, say he would whip Dupree; which threat was not communicated by him to Dupree. The Court also excluded this evidence, and the defendant excepted; but the Court offered to admit any evidence of threats against the negro woman.

The defendant then offered to prove by one Boyd, that Smith, about three weeks before the killing, had threatened Dupree in a violent manner, and exhibited at the time his loaded whip, which threats were communicated to Dupree before the killing. The Court, on motion of the solicitor for the State, refused also to admit this evidence; but still offered to admit any evidence of threats against the negro woman; and the defendant excepted.

The defendant then offered to prove by a witness named Keen, that the deceased came into Dupree's premises, some weeks before the killing, with his loaded whip, and went to one of the cabins in the lot, where his hireling, a white man named Breedlove, then stayed, and commenced a difficulty with Breedlove, and threatened to whip him, and was only prevented from executing these threats by the witness and two other men living there; and that this was communicated to Dupree before the killing. The Court also, on motion of the solicitor for the State, excluded this evidence, but still offered to admit any evidence of threats against the negro woman; and the defendant excepted.

The prisoner offered to introduce witnesses to prove his character, who lived in Mobile, twenty-one miles from the place of killing; who had known him for eight years, and had known his character for peace etc.; but the solicitor for the State objecting, this was excluded, and the defendant excepted.

The defendant produced a witness who testified that he had a requisition for Smith, at the time of the killing, as an escaped convict from the penitentiary of Georgia, and that he had informed the prisoner of this before the killing. This evidence, also, on motion of the solicitor of the State, was excluded; and the defendant excepted.

The defendant asked the Court to charge the jury—

1. "That, if they believed from the evidence before them, that there was a reasonable belief in the mind of the accused of some great personal injury or bodily harm about to be committed on him, by the deceased, then he can be excused for taking life.

2. "That, if the jury believed from the evidence, and from the circumstances of the case as detailed by the witnesses, that there was reasonable grounds on the part of the accused to believe that he was in danger of great bodily harm from the deceased, whether it actually existed or not, the killing, under such circumstances, would be excusable."

The Court refused to give either of these charges, except with the qualification, "that if the danger appeared to be imminent or pressing, either upon the defendant or upon his servant, he would be excused"; to which refusal, the defendant excepted.

Daniel Chandler, for the prisoner; *M. A. Baldwin*, Attorney-General, for the State.

A. J. WALKER, Ch. J., delivered the opinion of the Court :

The threats proved by the witnesses, Williams and Boyd, were made but a short time before the homicide. They were communicated to the prisoner before the homicide by the persons who heard them uttered. They were indicative of an angry and revengeful spirit, and of a determination to do violence to the prisoner's person. Such threats were admissible in this case, and the Court erred in excluding them. *Powell v. State*,^a 19 Ala., 577; *Carroll v. State*,^b 23 Ala., 28; *Howell v. State*,^c 5 Ga., 48; *Monroe v. State*,^d 5 Ga., 85; *The State v. Zellers*,^e 2 Halst.,

^a *Powell v. the State*, 19 Ala., 577. Supreme Court of Alabama, June term, 1857. The prisoner had been indicted for murder, and convicted of manslaughter. Extract from the opinion of the Court, delivered by COLMAN, J. : " We think the Court properly excluded the threat of Porter and his declaration concerning the field, as stated in the bill of exceptions. It appears that the admission of the threats, etc., as proof, was objected to, unless the defendant would prove that information thereof was communicated to them before the killing, which the prisoner failed to prove. The threats, if made known to the prisoner, would have been competent testimony, as tending to show, that in the assault on the deceased, he may have acted on a just fear of danger to his own life, but we cannot see, in this case, how they could be considered as proof pertinent to the issue. The eminent counsel for the prisoner have failed to produce any authority for the admission of such proof. They insist that it ought to have been permitted to the jury, to infer, from the circumstances, that the prisoner had knowledge of the threat. No circumstances from which such an inference might be drawn, are disclosed by the bill of exceptions, and if such existed, it was obligatory on the defence to show them affirmatively. We will not undertake to say that no case could occur in which such threats, although unknown to the prisoner, might be admissible, but we think there is nothing in this case to authorize their admission."

^b *Post*. • *Ante*, p. 469, note.

^c *Ante*, p. 442. • *Ante*, p. 471, note.

230; *Shorter v. People*,^f 2 Comst., 193; *Am. Law of Homicide*, 216; *Campbell v. People*,^g 16 Ill., 17; *Cornelius v. Commonwealth*,^h 15 B. Monr., 539.

The facts proved as to the conduct of the deceased, some weeks before, towards Breedlove, were irrelevant to the issue in this case. They pertained to a distinct and independent transaction, having no connection, which we perceive, with this case, and were properly excluded.

* * * * *

So, also, the proof that the deceased was a convict, escaped from the Georgia penitentiary, was inadmissible. Particular acts of misconduct on the part of the deceased, and offences against the law committed by him, and not connected with this case, were inadmissible. For a still stronger reason, parol evidence of his having been a penitentiary convict, was inadmissible. It is not allowable to go into proof of particular acts, unconnected with the case, to show the character of the deceased. *State v. Nugent*,ⁱ 18 Ala., 521; *Pritchett v. State*,^j 22 Ala., 39; *Franklin v. State*,^k 29 Ala., 14.

The character of the prisoner for peaceful disposition and habits was competent proof for him. *Felix v. The State*, 18 Ala., 720.

The witnesses by whom it was proposed to prove the character of the accused, had known him for eight or ten years, and were acquainted with his character. This was sufficient to qualify them to testify as to his character, notwithstanding they may have resided more than twenty miles from him. Residence in the immediate vicinity of the person whose character is the subject of investigation, is not an indispensable qualification of a witness to testify as to the character. Such a remoteness of residence would not prove that the witness did

^f *Ante*, p. 256, note. ^g *Ante*, p. 282, note. ^h *Ante*, p. 569, note.

ⁱ This case, an indictment for rape, held that it was not competent to prove particular acts of prostitution on the part of the mother of the prosecutrix, for the purpose of discrediting her testimony.

^j *Post*. ^k *Post*.

not know what the character was, and, therefore, would not disqualify him to testify on the subject. *Hadjo v. Gooden*, 13 Ala., 718; *Martin v. Martin*, 25 Ala., 201.

There was no error, either in the refusal of the Court to give the charges asked, without a qualification, or in the qualification of them, as stated in the bill of exceptions. *Oliver v. State*,¹ 17 Ala., 587; *Harrison v. State*,^m 24 Ala., 67; *Noles v. State*,ⁿ 26 Ala., 31. The charges asked might have misled the jury, by making the impression upon them that the plea of self-defence was sustained, although there was not a reasonable belief of a *present* necessity to strike for his own protection. This Court will never reverse for the refusal of a charge, the tendency of which is to mislead the jury.

The judgment of the Court below is reversed, and the cause remanded.

Judgment reversed.

NOTE.—A similar view is taken of the question of admitting evidence of threats made by the deceased and communicated to the defendant, in trials for homicide, in *Hughey v. the State*, 47 Ala., 97. This case was determined in the Supreme Court of Alabama, January term, 1872. PECK, C. J., PETERS and SAFFORD, JJ. Two points are considered: the *admissibility of evidence of threats* made by the slain against the slayer, before the killing, and the *effect* of such evidence, when admitted. Hughey was tried for the murder of James W. Crumbia; found guilty of murder in the first degree, and sentenced to the penitentiary for life. He was brother-in-law to the deceased. They lived near each other, and had been on bad terms for several months prior to the killing. The day before the killing, Crumbia sent a message to defendant, to the effect, that if he would admit that he had stolen some hogs, he, Crumbia, would be at peace with him. Hughey replied, "What I would say once, I could say twice, and what I would say twice, I would die by; and if Crumbia believes there is no hell in Georgia, let him go on." Hughey remarked to another witness on the same day, who had expressed a desire to see Crumbia and settle matters, that, if witness did not go soon, he would not get to see Crumbia.

It seems that no one was present at the killing, except the defendant and the wife of the deceased.

The defendant gave the following account of the killing to two witnesses, a few days after it happened: On the morning of the killing, he took his gun and went through the fields to Crumbia's house, and on getting within about a hundred yards of the house, sat some time on the fence. He then started in the direction of the house, and, after going a short distance, he saw the deceased in the field, and immediately presented

¹ *Post.* ^m *Ante*, p. 71. ⁿ *Post.*

his gun and popped a cap at deceased, who threw up his hands and asked, "What do you mean?" and then ran into the house. Defendant went a little closer to the house, stopping at the root of a tree, and, while there, took out a memorandum book and wrote something in it, and gave as his reason for so doing, that, as he did not know who might be killed, what he wrote would show something. At this tree, Hughey remained for two hours, and then went up near the house and stopped. Defendant intended to get in front of the house, but before he got in front of the door, deceased opened it, stepped in, looked around, and immediately shut the door. Defendant thought deceased saw him, and he, defendant, immediately cocked his gun, held his thumb on the hammer of the gun so that he might not shoot his sister by mistake, as he wanted to be sure it was deceased before he shot. "As soon as deceased appeared at the door, and Hughey was certain that it was Crumbia, he pulled down on him."

Another witness testified, that Hughey told him that while sitting at the root of the tree, he deliberated what he should do. Other witnesses testified, that shortly after the shooting, defendant told them that "he had killed Crumbia, and wanted them to see him decently buried at defendant's expense; that he regretted he had killed Crumbia, but Crumbia had repeatedly threatened his life, and waylaid the road the day before to kill him."

Defendant then offered to prove by several witnesses, that on various occasions, and for some time before the killing, deceased had been threatening defendant's life; that, on Saturday before the killing, deceased presented a gun at defendant, and would have shot him, had he not been prevented by the bystanders; that, on the day before the killing, deceased waylaid the road with his gun, for the purpose of shooting defendant; who, being warned of it, went another road; and deceased, after waiting some time on the road, went to defendant's home, and tracked him a mile or two. The State objected to the admission of this evidence. The Court asked if the defendant expected to show any act done by the deceased at the time of the killing, indicating an intention on the part of the deceased, to kill the defendant, or do him some great bodily harm; and upon the reply of his counsel, that they did not expect to show any such act on the part of the deceased, later than the evening preceding the killing, the Court sustained the objection, and excluded the proposed testimony, and the defendant excepted.

Later in the trial, the widow of the deceased, (who was sister to defendant), testified, that on the morning of the killing, Crumbia requested her to go to her father's to see if defendant was there; that on her refusal to go just then, deceased said he would go, and, taking his gun, started off. Soon, she heard a cap pop, and saw deceased running, with his gun first on one shoulder and then on the other. He ran into the house, and she shut the door. Deceased then hunted for a crack to shoot through, and asked her to go out and look for defendant, which she did, but saw nothing of him. After this, at deceased's request, she went to her father's, which was half a mile distant, to hunt for defendant, but saw nothing of him, and returned. Deceased went to the door and turned away, and soon looked out again, when the gun fired, and he fell, shot through the body, and expired in a few minutes.

After the testimony of this witness, defendant again offered to prove the threats and attempts of deceased as proposed before; but the Court excluded the evidence, and defendant excepted.

The Court charged the jury as follows:

1. "If the jury believe, from the evidence, that there was bad and unfriendly feeling existing between defendant and deceased at the time of the killing, and that deceased had made threats against defendant, and on the day before the killing, waylaid the defendant, and should further believe that, at the time of the killing, no attempt was being made to execute said threats, and nothing done to show an intention to execute said threats by the deceased, that then the threats so made would afford no excuse or justification for the killing of the deceased.

2. "That, if the jury shall believe, from the evidence, that bad and unfriendly feeling had grown up between the deceased and the defendant, and existed at the time of the killing, and that, on the morning of the killing, the defendant left his home with the intention to take the life of the deceased, and that, on the way to deceased's house, defendant met deceased about 150 yards from his home, and popped a cap at deceased, and that deceased ran into his house, and his wife closed the door; and that defendant, after deliberating some time, went up to the house of the deceased, and, as soon as the deceased showed himself, the defendant shot and killed the deceased, this would be murder on the part of the defendant, notwithstanding deceased may have made previous threats to take the life of defendant, and may have waylaid him for that purpose on the day before.

3. "That, if the jury believe, from the evidence, that defendant may have believed he would have either to take the life of the deceased, or lose his own at some future time, this would not justify or excuse the killing of the deceased, unless, at the time of the killing, deceased did some act showing an intention of taking the life of defendant, and which act was not provoked by some act of defendant at the time of the killing, showing an intention on the part of defendant, to take the life of deceased."

These charges were written, and the jury, with the consent of the Court, took the charges with them when they retired. The defendant excepted to each of the charges, and to the action of the Court in allowing the jury to take the charges with them.

The defendant then requested the Court to give the following written charges:

1. "That, if the jury believe from all the evidence, that defendant believed it was necessary to take the life of deceased, and defendant acted upon that belief alone, then it would rebut the presumption of malice, and the defendant would not be guilty of murder.

2. "That the delusion on the part of defendant, that deceased would take his life, and that it was necessary for him to kill deceased, in order to prevent the loss of his own life, brought about from his threats and lying in wait—if, from these circumstances, defendant really and honestly believed it was necessary to take the life of deceased to save his own, then defendant is not guilty of any offence. The necessity which will justify the taking of life need not be actual, but the circumstances must be such

as to impress the mind of the slayer with a reasonable belief that such necessity is impending, and the jury are to determine that fact from all the circumstances.

3. "That if the jury believe from the evidence, that there was such a derangement of defendant's mind at the time of the killing, that he believed that if he did not kill deceased, the deceased would take his life, and that the killing was done under such a state of mind, they should find the defendant not guilty.

4. "If the jury, after weighing all the testimony, have a reasonable doubt whether defendant killed deceased with malice, or to protect his own life, then they must acquit."

The Court refused to give any of these charges, and the defendant duly excepted.

W. S. Earnest, for the prisoner, contended that, according to Pritchett's case, *post*, there is a distinction between the doctrine of *threats*, and the doctrine of *attempts*; that where previous attempts to kill defendant have been made by deceased, such as waylaying him for that purpose, and the like, the law does not require, in order to excuse the defendant in slaying him, that there should have been at the time of the killing an actual attempt, or overt act, indicating a design to kill, or do great bodily harm. This position is in accordance with the cases of Phillips, Carico and Bohannon, *ante*, pp. 383, 389 and 395, as we understand them, although the counsel did not cite these cases.

J. W. A. Sanford, Attorney-General, for the State.

PETERS, J.—[After stating the case.] "No threats, unaccompanied with acts which threaten the life or limb of the slayer, will justify or excuse a felonious homicide. The threats insisted on in this case, were not of this character. The Court properly excluded them, as they could have been offered for no other purpose. *United States v. Wiltberger*, 3 Wash. C. C., 515, [*ante*, p. 34]; 2 Arch. Cr. Pl., 223 (marg.) *et seq.*, and notes, *Waterman's ed.*, 1853.

"The objections to the charges given by the Court, and to the refusal of those moved for by the defendant on the trial below, proceed upon the same mistake, that mere antecedent threats are an excuse or justification for a felonious homicide. This is not so. There must be actual danger to the slayer at the time of the fatal blow, or such a state of facts as are justly calculated to impress his mind with the existence of such danger, before he is justified to strike in self-defence. Self-defence is simply the resistance of force, or seriously threatened force actually impending, by force sufficient to repel the danger, and no more. If it goes beyond this, there is guilt, which is not excusable or justifiable. This is the result of the cases and authorities above cited. 2 Bouv. Law Dict., p. 509, SELF-DEFENCE, and cases there cited. On the trial below, there was no proof of actual impending danger, or any seeming danger, which would have justified the prisoner in his heartless destruction of his victim's life. He sought the occasion to kill, with the purpose to kill, when there was no sufficient necessity for it, and when it might have been avoided, and when it was clearly within his power to have resorted to peaceful means, to restrain the deceased, had it been his wish to have assaulted him. Rev. Code, p. 741, § 3956, *et seq.*

We think the conviction was eminently proper and regular, and it must stand.

"The judgment of the Court below is affirmed; and that Court will proceed to execute its sentence, as required by law."

Upon the point that in trials for homicide, evidence of threats made by the deceased and communicated to the slayer before the killing, will not be heard, unless there is evidence tending to show that at the time of the killing, there was some overt act on the part of the deceased, showing a design then to execute such threats, this last case is in accord with Hays' case, *ante*, p. 492; with Myer's case, *ante*, p. 432; and with the dissenting opinion of LINDSAY, J., in Pridgen's case, *ante*, p. 425. But the reverse is held by the majority of the Court in Pridgen's case, *ante*, p. 416, and also by a full Court in Robert Jackson's case, *ante*, p. 476; and upon the high ground that the judge cannot determine whether a predicate has been laid for the introduction of such testimony, by proof tending to show an overt act, without trespassing upon the province of the jury. And this reasoning would seem to apply with considerable force to the present case; for clearly the circuit judge, in excluding the testimony of previous threats and lyings in wait, did, in effect, pass upon the weight and effect to be given to the testimony of Mrs. Crumbie—whereas, the jury ought to have been left to view that testimony, if possible, without any knowledge or intimation of the judge's opinion as to its force and effect. Selfridge's case, *ante*, p. 19. The better practice would seem to be to admit evidence of this character in trials for homicide, and then to instruct the jury, not as to its weight, but as to its legal effect, if believed. Instead of this, this case presents this singular feature: the circuit judge excluded the evidence, and then instructed the jury as to its legal effect, as though it had been admitted. Upon the whole, the excluded testimony, had it been admitted, may have shown that both of these parties were diligently seeking each other's blood, and that the solution of the question, which of them should succeed in his work of vengeance, depended upon which of them should be able to obtain, by stealth or by surprise, a cowardly advantage of the other. They were probably as much at war with each other as two savages; and it seems unfortunate that cases of this character should be submitted to a jury upon one side of the testimony only.

It is not a little singular, that while the Court should, in this case, have adopted a restrictive and exclusionary rule of evidence, the policy and justice of which has been questioned in several well considered cases, such as that of Pridgen, *ante*, p. 416, Monroe, *ante*, p. 442, Robert Jackson, *ante*, p. 476, Keener *ante*, p. 539, and Rector, *post*, the same Court in another case—Fieldsv. The State, 47 Ala., 603, which we shall consider hereafter—have, in effect, declared that, in trials for murder, evidence of the bad character of the person slain is admissible in mitigation of the punishment to be assessed by the jury—thus making itself, as we apprehend, the first court that has had the distinction of deciding that it is less a crime to murder a bad man than a good one.

The same question arose in Louisiana, in the State v. Mullen, 14 La., An., 577.

Extract from opinion of the Court, by MERRICK, Ch. J.: "Neither can we say that he erred, to the prejudice of the accused, on the two other

points, 5th and 6th, requested by the counsel for the accused, to be given in charge to the jury. We will copy the charge requested, and the charge as given.

"The judge was requested to charge, 5th: 'That, if the jury find, from the evidence, that there had been threats of personal violence by the deceased towards the prisoner, which had been communicated to the prisoner before the killing, and the jury think that these threats were sufficient to cause Mullen to think that McGlone was about to assail his life, or thought that his life was in danger, then, in law, there was no malice in the prisoner, and he cannot be found guilty of murder.'

"The Judge said: 'The charge asked for on this point, is not sufficiently distinct. The Court charges, if McGlone threatened to take Mullen's life, or to do him great bodily harm, and Mullen was informed of the threat, and thereupon armed himself for the true and sole purpose of self-protection, and McGlone and Mullen subsequently met without design, and McGlone drew a deadly weapon and approached Mullen with the apparent intention to assault him with it, and Mullen believed he was in danger of his life, or great bodily harm, and had no way of avoiding his adversary, and advanced upon McGlone and slew him, and the jury are satisfied of these facts, and are of opinion that Mullen acted upon a *bona fide* reasonable ground of apprehension as stated, then the killing was justifiable, in self-defence, and the jury are bound to acquit the defendant. But if McGlone threatened Mullen with personal violence, and assault and battery, or great bodily harm, and the threat was communicated to Mullen, and Mullen thereupon armed himself with a deadly weapon, and met McGlone and slew him, while McGlone was not making any hostile demonstrations against him, the killing was wilful, deliberate and malicious, and is murder.'"

The same question had previously arisen in Louisiana, in *The State v. Leonard*, 6 La. An., 420. Indictment for murder. Extract from the opinion of the Court, delivered by PARSON, J.: "The defendant offered to prove, that within a month previous to the homicide, of which he was accused, the deceased had, while in the parish prison, declared to a fellow-prisoner, that he would kill the defendant. The object of the evidence was to alleviate his offence into manslaughter or excusable homicide.

"Foster informs us, that in every case of homicide upon provocation, how great soever it be, if there is sufficient time for passion to subside and for reason to interpose, such homicide will be murder, p. 296. The time that intervened between the utterance of the words and the perpetration of the homicide, forbid the idea that the offence might be reduced to manslaughter, on account of the menaces. For, even if the defendant heard of them, which does not appear by the bill of exceptions, and was excited to such a degree at the moment, as to have alleviated an immediate homicide into manslaughter; yet, there was sufficient time for passion to cool, and reason to resume her sway.

"Besides, East, in commenting upon Lord Morley's case, relied upon by the counsel of the accused, concludes 'that menaces of bodily harm, to be a sufficient provocation to reduce the offence of killing to manslaughter, should, at least, be accompanied by some act denoting an immediate intention of following them up by an actual assault.' [1 East P. C., 233.]

"Nothing of this kind is pretended in the bill of exceptions. On the contrary, it is stated, that 'the accused sought, pursued and killed the deceased.'

"We know of no cases in which it is held that menaces without dangerous action, will excuse a homicide. Blackstone, on the contrary, informs us, that 'no affront by words or gestures only, is a sufficient provocation, so as to excuse or extenuate such acts of violence, as manifestly endanger the life of another.' 4 Bla. Com., 200."

This last case is somewhat like Jackson's case, *ante*, p. 520, note; and what is there said with reference to the connection between the doctrine of threats and cooling time, will be to some extent, applicable here.

The same question was considered in *The State v. Collins*, 32 Iowa, 36, determined in the Supreme Court of Iowa, June Term, 1871. The case is stated in the opinion.

MILLER, J.: 1. The evidence shows that the defendant and several others were in a restaurant in Mason City at the time of the alleged crime; that one James R. McMillin, in company with one Babcock, came in while Collins, the defendant, was still there; that at the time McMillin came into the room where the defendant was sitting, McMillin was excessively intoxicated—as the witnesses express it, "as drunk as a man could be and stand up;"—that McMillin staggering towards one Kirk, who was sitting near the defendant, took hold of Kirk and pulled him off a box on which he was sitting; that Kirk told him to "hold on, or he would step on Bill Collins' toes;" that McMillin said, "he did not care for Bill Collins or any other man;" and letting go his hold of Kirk, he staggered away from him, and put his hand on the defendant's shoulder and turned him partly around, at which time the defendant sprang to his feet, took hold of McMillin with his left hand (some of the witnesses say by the throat) and stabbed him with the large blade of a common-sized jack-knife, which he held in his right hand, and with which he had been whittling. The wound made by the knife was a little to the left of the middle line of the body, two and a half inches from the navel, about one-half inch wide, and from two and a half to three inches deep, and entered the stomach.

On the trial, the defendant offered to introduce evidence to show that McMillin, the person stabbed, was a large, powerful and muscular man, who, when under the influence of liquor, was quarrelsome, ugly, dangerous and vindictive; that defendant knew these facts; and in connection with this offer, he also proposed to prove, that on the same day, and shortly before the commission of the assault, McMillin had threatened to take defendant's life, of which threat he had been informed only a few minutes previous to the assault.

The Court refused to admit this evidence, and this ruling is assigned as error.

A man may repel force by force, in the defence of his person, habitation or property, against one who manifestly intends and endeavors, by violence or surprise, to commit a known felony on either. In such cases, he is not obliged to retreat, but may pursue his adversary until he finds himself out of danger. Wharton's Am. Crim. Law, 3d ed, 456. And it has been held by this Court, that a person is not required to flee from his adversary, when assailed with a deadly weapon, and retreat to the wall, before he can jus-

tify the killing of his assailant. *The State v. Tweedy*, 11 Iowa, 350, [*post.*] But to make a homicide justifiable, on the ground of self-defence, there must be an actual and urgent danger. *Ib.* 457, *the State of Iowa v. Neeley*, [*ante*, p. 96]; 20 Iowa, 108, *the State v. Thompson*, 9 *Ib.*, 188, [*ante*, p. 92.] It is not necessary, however, that the danger should in fact exist, but that there be actual and real danger, *to the defendant's comprehension*, as a reasonable man. The enquiry is not whether the harm apprehended was actually intended by the assailant, but was it actual and real *to the accused*, as a reasonable man, as compared with danger remote or contingent. *The State v. Neeley*, *supra*; 1 Bishop's Cr. Law, 385; Wharton on Homicide, 407. Without expressing any opinion in respect to the *sufficiency* of the rejected evidence in this case, to justify the alleged assault, or even to mitigate its degree, we are of the opinion it should have been admitted to the jury, under proper instructions from the Court upon the law, so that the jury, with all the facts and circumstances connected with the transaction before them, might be enabled to judge of the *intent* and motive of the defendant in the commission of the assault; whether to his comprehension, as a reasonable man, there was such an actual and urgent danger as to justify the alleged assault, or whether it was made wantonly and without actual apprehension or danger from McMillin. * * * The judgment was reversed.

THE PEOPLE V. SCOGGINS.

[37 CAL., 677.]

Supreme Court of California, July Term, 1869.

LORENZO SAWYER, *Chief Justice.*

AUGUSTUS L. RHODES,

SILAS W. SANDERSON,

ROYAL T. SPRAGUE,

JOSEPH B. CROCKETT,

} *Associate Justices.*

PRINCIPLES WHICH GOVERN THE ADMISSIBILITY OF EVIDENCE OF THREATS IN TRIALS FOR HOMICIDE.

1 Threats made by the defendant are admitted for the purpose of showing malice, and thereby increasing the probabilities that he committed the offence.

2. Threats made by the deceased or injured party, if known to the defendant at or prior to the transaction, are admitted for the purpose of showing that the circumstances of the offence were such as to excite the reason-

able fears of the defendant that his life was in danger, or that he was in danger of serious bodily injury, and thus justify his act. [Acc. Sloan's case, *ante*, p 516, and citations ; Keener's case, *ante*, p. 539.]

3. In a case of homicide, where it is doubtful which party commenced the affray, threats made by the deceased are admissible on the part of the defendant, although unknown to him at the time of the homicide, as *facts* tending to illustrate the question as to which was the first assailant. [Acc. Sloan's case, *ante*, p. 516 and references.]

4. But it would be the duty of the Court to explain to the jury carefully, that the proof was admitted only as tending to corroborate whatever other evidence there was that the deceased was the assailant, and for no other purpose.

Appeal from the District Court, Second Judicial District, Butte County.

The facts and the points, and authorities cited by counsel, are fully stated in the opinions delivered in the case.

Cofforth & Spaulding, for appellant; *Jo. Hamilton*, Attorney-General, for the people.

CROCKETT, J., delivered the opinion of the Court :

The defendant was indicted for the crime of murder, in the killing of one Joseph E. Lowery.

* * * * *

On the trial, another question was raised as to the admissibility of certain evidence offered by the defendant, and ruled out by the Court, under an exception by the defendant. The facts, as established by the evidence, were, that on the day of the homicide, Lowery (the deceased), with his wife and two children, left his house, which is several miles distant from the residence of the defendant, with the intent to visit the town of Dayton ; that after remaining at Dayton some hours, he started to return to his home, and in doing so, went into a stubble field of defendant, and broke down the fence for the purpose of allowing his hogs to enter the enclosure ; that the defendant was present and resisted these proceedings, but was unarmed ; that considerable angry discussion ensued, during which the defendant dragged the deceased from out the vehicle in which he and his wife and children were riding ; that the deceased had on his

person a pistol, which he had placed in his breast pocket the day before, never before then having been in the habit of carrying a pistol; that a scuffle ensued between the deceased and the defendant, during which, one Crouch, took the pistol from the deceased, but subsequently handed it to the wife of the deceased, after both had returned into the vehicle; that deceased then drove off, but shortly stopped again, and, rising up in an angry manner, threatened to tear down the fence, and to shoot the defendant; that he then went off at a brisk trot for about a quarter of a mile, when he stopped, and again commenced to tear down the fence at another place; that the defendant then mounted a horse, and passing the deceased, went to a neighboring house, where he borrowed a shot gun, with which he returned to the place where the deceased last broke down the fence; that, in the meantime, the deceased had left, and was driving away through the field; that the defendant pursued him, having the shot gun lying crosswise in front of him; that, on overtaking him, and coming within range, he shot the deceased, who fell from the vehicle; that the pistol was found on the ground, near to the deceased, by those who immediately came to his assistance. The theory of the defence is: that, as the defendant approached, the deceased raised the pistol in a threatening attitude, and was about to fire upon the defendant when he received the fatal shot, and, consequently, that the homicide was committed in self-defence. One of the physicians, who attended the deceased, testified that "his right arm must have been raised, from the position of the shot, at time of receiving it." On the other hand, Mrs. Lowery, the widow of the deceased, testified, that, at the time of the fatal shot, the pistol was lying in her lap, with her hand resting upon it, and that it had not been out of her possession from the time when she received it from Crouch. On the trial, the defendant offered to prove that, a few days before the killing, the deceased, in speaking of the defendant, had said "that Scoggins, (the defendant), was a damn son of a bitch, and that he

would kill him inside of ten days," and that, on the very day of the homicide, the deceased threw open the breast of his coat, and exhibited a pistol to the witness, and said "he would make the son of a bitch of Scoggins (the defendant), bite the dust before night with this," referring to the pistol. It was admitted that these threats were not communicated to the defendant at any time before the homicide, and the proof, as stated at the time by counsel, was offered as tending to show the bitter enmity and feeling of the deceased towards the defendant at the time of the killing, and his purpose in having the pistol in his possession, and that it was his intention to use it on the occasion when he was shot; and as tending to prove the *animus* and intention of the deceased towards the defendant at the time of the homicide.

The evidence was excluded by the Court, and the defendant, having excepted, relies on this ruling as error. If the threats of the deceased had been communicated to the defendant before the killing, the evidence would have been clearly competent. A person, whose life has been threatened by another, whom he knows, or has reason to believe, has armed himself with a deadly weapon for the avowed purpose of taking his life, or inflicting a great personal injury upon him, may reasonably infer, when a hostile meeting occurs, that his adversary intends to carry his threats into execution. The previous threats alone, however, unless coupled at the time with an apparent design then and there to carry them into effect, will not justify a deadly assault by the other party. There must be such a demonstration of an immediate intention to execute the threat, as to induce a reasonable belief that the party threatened will lose his life, or suffer serious bodily injury, unless he immediately defends himself against the attack of his adversary. The philosophy of the law on this point is sufficiently plain. A previous threat alone, and unaccompanied by any immediate demonstration of force at the time of the encounter, will not justify or excuse an

assault, because it may be that the party making the threat has relented or abandoned his purpose, or his courage may have failed, or the threat may have been only idle gasconade, made without any purpose to execute it. On the other hand, if there be at the time such a demonstration of force as would induce a well-founded belief in the mind of a reasonable person, that his adversary was on the eve of executing the threat, and that his only means of escaping from death or great bodily injury, was immediately to defend himself against the impending danger, the law of self-defence would justify him in the use of whatever force was necessary to avert the impending peril. In such a case, proof of the previous threat, and that it was communicated to the defendant, would be competent, as tending to show the *animus* of the party, and that the defendant acted upon a well-grounded apprehension that his adversary was about immediately to put his threat into execution.

But the question in this case is: whether or not previous threats of the deceased, *not communicated to the defendant*, were competent evidence for any purpose on the trial. In the case of *The People v. Arnold*,* 15 Cal., 476, the same question, substantially, was before this Court. * * *

* The learned Judge here stated the facts of Arnold's case, and quoted at considerable length, from the opinion. This we omit from the text, and here give in full that part of the opinion of the Court in Arnold's case, which relates to the doctrine of uncommunicated threats:

BALDWIN, J.,—COPE, J., concurring:—The main question arises on the admissibility of certain testimony. The defendant was indicted and tried for feloniously killing one John M. Sweeney. His plea was, that the homicide was in self-defence. The testimony was somewhat conflicting as to the facts occurring at the time of the killing, or, at least, was claimed to be so by the defendant. On the trial, one Lawrence Morris was a witness for the prosecution, and among other things, testified, that he was present on the twenty-fourth of August, 1859, at the difficulty that then occurred between this defendant and Sweeney, in the course of which, the defendant discharged a double-barreled shot-gun at Sweeney, the charge from which took effect in his thigh, whereupon Sweeney fell forward; that immediately thereafter, the witness approached Sweeney, and saw, lying on the ground, about six feet forward of him, a pistol, which the witness had previously seen in Sweeney's possession. The witness then proceeded to detail cir-

We have made this liberal extract from the opinion, because, in our view of the case, it expounds the law of this case. If a deadly rencounter occurs between two persons, in which one is killed, and if the survivor claim that he acted in self-defence, the evidence of those who witnessed the transaction, may leave it in doubt which of the two was the assailant. There may even be very slight proof that the deceased was the aggressor; and yet, if it be established, that, shortly before the affray, the deceased armed himself with a deadly weapon, declaring, with apparent sincerity and earnestness, that he had procured it with a fixed determination to take the life of his adversary on sight, it cannot be denied that this would tend, in some degree, to corroborate

circumstances immediately connected with the difficulty, in which the witness himself, armed with a pistol, took an active part with Sweeney against the defendant and his sons; and he then says, the pistol he saw lying on the ground after Sweeney fell, Sweeney borrowed from Mr. Cordes, some time before the twenty-fourth of August, 1859; that Cordes had, in the presence of witnesses, given the pistol to Sweeney, who said he would clean it; and that he, (the witness), had often since that time, and before the twenty-fourth of August, 1859, seen said pistol in Sweeney's possession.

The defendant's counsel then asked the witness the following question: "At the time Cordes gave the pistol to Sweeney, was anything said by Sweeney, with reference to using the pistol against the defendant, Philander Arnold?"

To this question, the counsel for The People, objected, on the ground that it was irrelevant and incompetent.

The Court decided that the testimony was inadmissible, unless evidence was produced, tending to show that the thing said, had come to the knowledge of the defendant, and sustained the objection; to which decision, the defendant excepted.

We do not understand that the testimony rejected was offered for the purpose of proving a threat on the part of the deceased. It is clear, that the mere fact that one man threatens to kill another, is no sort of justification to the latter to kill the former. The threats must be shown to have been communicated to the accused, before they are admissible for any purpose, and then the effect and bearing of the testimony should be explained by the Judge to the jury before the case is finally submitted to them. In this case, there is no pretence that this threat, if there was any, was so communicated. The ground taken by the defendant's counsel is, that the question presented to the jury by the proofs, was the question of fact, as to which one of these parties first assaulted the other; and the defendant contended that the deceased was the aggressor in the fatal rencounter, and had placed defendant in danger of his life, from which peril

whatever other evidence there was, tending to show that the deceased was the assailant. Of itself, and unsupported by other facts, it might, and probably would, be deemed wholly insufficient to establish the fact proposed. Nevertheless, it would constitute an item of proof, tending, it might be slightly, but still in some degree, toward the conclusion proposed to be established. The weight to be attached to it, is for the jury to consider, in connection with the other proofs; and it would be the duty of the Court to explain to the jury, carefully, that the proof was admitted only as tending to corroborate whatever other evidence there was that the deceased was the assailant, and for no other purpose.

he could only extricate himself by slaying his assailant. The counsel contends, that any fact which conduces to show that this theory is true, was legitimate evidence, and that this fact of the declarations of Sweeney at the time of borrowing the pistol, does so tend. The object of a trial is to elicit the real state of the transaction, and the rules which govern or determine the introduction of testimony have relation to this end. These rules are not mere arbitrary, conventional regulations; they are founded in reason and good sense. Generally speaking, whatever has a tendency to prove a material part of the issue is admissible. This proof may be direct or inferential, or positive. It may be more or less conclusive, but if it be relevant, this want of conclusiveness is no bar to its introduction.

The question in this case, as made by the prisoner, was the fact of the assault by the deceased; and, in a conflict of proofs, the solution of this fact was, or might have been, dependent upon a variety of considerations; and these were to be passed upon, and the conclusions reached by the jury, as the exclusive arbiters of this question. The defendant was entitled to urge all the considerations conducing to establish his theory, and to disprove that of the prosecution, which could be fairly presented to the jury.

He had a right to urge, as well expressly proven facts, as the probabilities and inferences to be drawn from the conduct of the parties connected with the occurrence. He did urge, as we infer from the record, that this assault was not made by him, but that it was made by Sweeney; and to prove this, he proposed to show that Sweeney had armed himself with this pistol; that he had borrowed it, and that it was found at the place of the encounter. He was permitted to show these facts, but he proposed to show a further fact, and that was, that, at the time of Sweeney's getting the pistol, he declared what he meant to do with it. This declaration, being made at the time of procuring the weapon, was a part of the *res gestæ*, and illustrative of the transaction. It shows, in other words, the purpose for which the weapon was procured. This leads us to the enquiry, whether the fact that A. procures a weapon for a particular purpose, conduces at all

It is alleged, however, that, in this case, there was an entire absence of proof that the deceased was the assailant, and that evidence of the previous threats ought not to be admitted, because there was, in fact, no proof whatever that the defendant acted in self-defence. But, without attempting to analyze the proofs, it is enough for us to say on this point, that Mrs. Lowery was the only witness immediately present at the time of the encounter, and though she testifies that she had the pistol in her lap at the moment when her husband was shot, and had not parted with it from the time when she received it from Crouch, it was for the jury to decide upon her credibility; and there was evidence tending to show that immediately after the affray, the pistol was found upon the ground, not far from the deceased, after he fell from the buggy. One of the attending physicians also testified that, from the position of the wound, the right arm of the deceased must have been elevated when he received the fatal shot. We do not wish to be understood as intimating any opinion as to the weight to be attached to these facts, nor as expressing any doubt as to the credibility of Mrs. Lowery. These are matters for the jury, and we refer to them only for the purpose of

to show, in a question of conflicting proof, as to the manner in which he used it, what that manner was. We apprehend that if a man goes into a house, borrows a gun, goes out with it, saying that he means to use it on another, and a rencounter happens between him and that other, and the witnesses who see the difficulty differ, or the circumstances are equivocal as to which one of the two commences the affray, that some light might be thrown upon this question, conducing to or towards its solution by the proof of these facts as to A.'s procuring it, and his motives in doing so. The jury might possibly, with some reason, conclude, that, as the weapon was procured for this purpose of assault on another, that purpose was fulfilled; that the assault, in other words, was made in pursuance of the intended purpose when the weapon was procured, and especially, if other facts in corroboration of this conclusion existed. But the fact of the conclusiveness of this proof to establish the proposition which it is introduced to prove, is not the decisive question; that question is, whether this item of fact be a matter *proper to be considered* by the jury in arriving at their conclusion upon this mooted point. And we have no doubt that it is; that it may enter into the deliberations of the jury with all the other facts, as a matter to be weighed by them with the rest of the proofs. * * * The judgment was reversed.

showing that proof of the previous threats was not wholly irrelevant and impertinent.

In support of our views on this point, we refer also to *People v. Williams*,^b 17 Cal., 146; and *Dukes v. The State*,^c 11 Indiana, 566.

Judgment reversed, and cause remanded for a new trial, and remittitur ordered to issue forthwith.

^bThe citation of this case is hardly relevant here. It turns chiefly upon a question of practice; namely, the manner of instructing juries in criminal trials. The opinion, delivered by BALDWIN J.—COPE, J., concurring—contains an animadversion upon the use by the district judge, of the word "victim," when speaking to the jury, in his charge, with reference to the deceased. Another feature of the charge is discussed in the opinion of the Court, as follows; "After the general charge given by the Court, the defendant's counsel requested this instruction: 'If defendant inflicted the mortal wound in self-defence, and his danger was so urgent and pressing, that in order to save his own life, it was necessary that he should have inflicted such wound, then the jury must acquit.' This charge was refused, but no reason was given by the Court for the refusal. It is not denied that the instruction was legal; but it is said that there was no error in refusing it, because the Court had already given the same instruction, though in different language. It is always better for the Court when an instruction presents the law accurately, to give it, especially in criminal cases, in the very words asked. The reason of this is, that counsel argued their case to the jury with reference to the law, as announced in their own language. They select words to convey as precisely as they can, the very idea and meaning they seek to impress. A change of phraseology, therefore, may render the legal proposition less intelligible or less emphatic. Counsel may desire a proposition to be given in different terms, in order that it may be more clearly understood. If the Court refuses a charge once clearly given, on the ground that it has already given it in different terms, it should inform the jury very distinctly that this is the reason for the refusal, else prejudice and misunderstanding may result. The jury may infer that the instruction was refused on its merits. But this is not an open question in this Court. *People v. Hurley*, 8 Cal., 390; affirmed in *People v. Ramirez*, 13 Cal., 172.

"We are not to be understood as holding that the mere refusal of the Court to instruct in the language asked, the instruction having been given in substance, or that the mere refusal to repeat an instruction before given, in the same or different language, would be ground for reversal. We simply hold, that if the Court refuses a proper instruction in a criminal case, it is no answer to the error assigned, for this cause, that an equivalent one was before given, unless this reason be assigned at the time of the refusal."

See upon the same point, *Neeley's case*, *ante*, p. 96; *Lamb's case*, *post*; *People v. Williams*, 32 Cal., 280.

^c *Ante*, p. 572, note.

Mr. Justice SANDERSON delivered the following opinion, in which Mr. Justice SPRAGUE concurred:

* * * * *

The next point relates to the exclusion of certain testimony as to threats which had been made by the deceased a short time before the homicide was committed, but which had never been communicated to the defendant. For the purpose of disposing of the present appeal, a consideration of this point is unnecessary, but, as it will doubtless arise upon the new trial, which must be granted, it is better that it should be considered now.

The case shows that the defendant offered to prove that, five days before the homicide was committed, the deceased came to the farm of the defendant in his absence, and declared to the witness that "Scoggins (the defendant), was a damn son of a bitch, and that he would kill him inside of ten days"; also, that on the morning of the day on which the homicide was committed, at a place about five miles distant from the place at which the homicide was committed, the deceased, exhibiting a pistol to the witness, said "that he would make the son of a bitch, Scoggins, bite the dust before night with this." In offering to prove these threats, counsel for defendant admitted that they had never been communicated to the defendant prior to the homicide, and, therefore, could not be received in evidence upon the ground that they tended, in connection with other facts, to show that the circumstances of the homicide were such as to excite in the mind of the defendant the fears of a reasonable person, that the deceased was about to commit a felony upon him, and justify the killing; but it was insisted that they were admissible, for the purpose of sustaining the defendant's plea, that the killing was in self-defence, by showing probable grounds for the theory of the defendant that the deceased was the assailant, and was in the act of presenting his pistol at the defendant, with deadly intent, at the time the latter fired, and, therefore, that the homicide was justifiable.

In view of the fact admitted by counsel, that these threats were unknown to the defendant until after the homicide was committed, the Court below ruled that they were not admissible for any purpose.

It appears that there was some dispute between the deceased and the defendant, in relation to the right of the former to pasture his hogs in certain fields, which had been previously in the possession of the deceased, but which, at the time of the homicide, had come into the possession of the defendant, with the understanding, as claimed by the deceased, at least, that the hogs of the deceased should be allowed to run in certain stubble fields until the commencement of the rainy season. The defendant does not seem to have so understood it, but if he did, he was not disposed to carry out the arrangement. On the contrary, he seems to have turned the hogs out of the fields, and shut them out, some time prior to the homicide. On the day of the homicide, the deceased, with his wife and two little children, went to the fields in question in a two-horse buggy, the deceased having armed himself with a pistol before starting, which was quite contrary to his usual custom. Upon reaching the fields, the deceased proceeded to knock down the fence, so as to let in the hogs. While he was thus engaged, the defendant came along, whereupon, an altercation and personal rencounter took place between them, in which the deceased was dragged from his buggy and thrown on the ground by the defendant. The deceased seems to have made an effort to draw his pistol, and when the witness, Crouch, came up, the contest seems to have been mainly over the possession of the pistol, which was still in the pocket of the deceased. Crouch interfered, and took possession of the pistol, by common consent. Soon after, the contest ceased, and the deceased returned to his seat in the buggy. Crouch gave the pistol to the wife of the deceased, upon her promise that she would not allow it to go out of her possession. During this time, the parties had called each other liars and other hard names. The defendant

insisted that the deceased must not tear down his fences, and the deceased threatened to tear them down as often as the defendant put them up, and as he drove off, threatened to shoot the defendant, and to tear down the fences at four or five other places. The defendant replied, "that if he intended to tear down more fence, he had better take the women and children home first." The deceased drove off some distance, and then again proceeded to tear down the fence. The defendant remarking, that he would not stand it, mounted a horse and rode after the deceased, whom he passed, and went to the house of one Davis, where he obtained a double-barreled shot-gun. By this time, the deceased had turned his team in the direction of his home. The defendant followed, and came up behind his buggy, when he fired his gun at the deceased, hitting him at the back of the right shoulder. No one, except the wife, saw what transpired at the time of the shooting. She testified, that, when the defendant rode up behind their buggy, she turned round and looked at him; that he was in the act of aiming his gun at her husband; that she put her hand on her husband's shoulder, and said: "He is going to shoot you;" that her husband then turned around toward the defendant, and immediately received the fatal shot; that the pistol was in her lap at the time, and that it had never been out of her possession from the time it was given to her by Crouch. The deceased fell out of the buggy, and there was some testimony tending to show that the pistol was picked up near the place where he fell. One of the medical witnesses gave it as his opinion, that the right shoulder of the deceased was presented toward the defendant at the time of the shooting, and that his right arm was in a raised position, such as would have been its position had the deceased been engaged in presenting a pistol at the defendant at the time he received his death wound.

Such being the circumstances of the killing, it is claimed on the part of the defendant, that the finding of the pistol at or near the place where the deceased

fell, and the elevated position of his right arm at the time he received the defendant's shot, are circumstances tending to show that the deceased himself was the assailant, and was about to take the life of the defendant at the time the latter fired. That this theory would have been further established, or fortified, by proof of the threats which had been previously made by the deceased, and that the testimony, in respect to those threats, ought to have been received, as being of the same general character and effect as the finding of the pistol and the position of the arm, or as adding still another to the probabilities which tended to support and establish the theory of the defendant.

It is well settled, that *threats, as such*, are admissible only in two cases: first, threats made by the defendant, which are admitted for the purpose of showing malice, and thereby increasing the probabilities that the defendant committed the offence; second, threats made by the deceased, or the party injured, and *known* to the defendant at the time of the transaction, which are admitted for the purpose of showing that the circumstances of the killing were such as to excite the fears of a reasonable man that the defendant's life was in danger, or that he was in danger of serious bodily injury, and thus justify the act. Unless they are known to the defendant at the time he acts, they can have no effect whatever to excite his reasonable fears, and cannot, therefore, be received for the purpose of showing that such was the case. But, it has been argued, with much ability and force, that the purpose suggested is not the only purpose that can be subserved by such testimony; it being claimed that previous threats, made by the deceased or injured party, are *facts* or *circumstances*, which tend to illustrate the question as to which party was the first assailant, and is of controlling weight in a doubtful case. The argument is: that every fact or circumstance from which any rational presumption can be drawn by the jury, is relevant, however trifling its weight, and, therefore, must be received; that threats

indicate malice, and the presence of malice affords rational ground for the act charged, especially in a case of conflicting testimony.

This view seems to be sustained by the case of *The People v. Arnold*,⁴ 15 Cal., 476. There the plea of the defendant was self-defence, and it was claimed, on his part, at least, that the testimony as to which party made the first assault was conflicting. In some respects, the facts in that case and of this are alike. One Morris was a witness for the prosecution, and, among other things, testified that he was present when Sweeney, (the deceased), was shot by the defendant; that, immediately after the shooting, the witness approached Sweeney, and saw lying on the ground, about six feet forward of him, a pistol which he had previously seen in Sweeney's possession, and which Sweeney had borrowed of one, Cordes. Counsel for defendant then asked the witness the following question: "At the time Cordes gave the pistol to Sweeney, was anything said by Sweeney with reference to using the pistol against Arnold?" To this question, counsel for The People objected, upon the ground that the answer was irrelevant and incompetent. The Court below sustained the objection, upon the ground that what was said by Sweeney, as was admitted by counsel, had not been communicated to the defendant before the homicide. The admissibility of the supposed threats of Sweeney was urged upon the same ground which has been adopted in the present case.

Among other things, the Court said:

[Here the learned Judge quoted at considerable length from that part of the opinion in *Arnold's* case, which will be found on pages 602 and 603, *supra*, and then proceeded:]

A like result was reached by the Supreme Court of Indiana, in the case of *Dukes v. The State*,⁵ 11 Ind., 557.

Much the same question came before this Court, in a late case, *Lyon v. Hancock*, 35 Cal., 372. Lyon and wife brought a civil action against Hancock, for the malicious

⁴ *Supra*, note a. ⁵ *Ante*, p. 572, note.

arrest of the wife. The defendant claimed, that he had arrested Mrs. Lyon in good faith, believing that she had, on the instant previous to the arrest, maliciously thrown a brickbat through his window. The evidence that she had thrown the brickbat consisted of the fact only, that she was the only person whom the defendant found in the street immediately after the brickbat was thrown. Such being the case, the defendant offered to prove ill-feeling on the part of the husband toward him, and that he had made threats against him, as tending to show that she threw the brickbat. The Court below excluded the testimony, but we held that it ought to have been received as relevant, though of little weight, to the question whether she threw the brickbat. Among other things, we said :

“To ascertain the truth of facts in the absence of mathematical certainty, is to count opposing probabilities, and determine on which side lies the superior number. In computing the number, no rational probability on either side should be rejected. It matters not how trivial or unimportant it may seem when standing by itself, for when placed by the side of other probabilities, it may from relation become significant. Besides, under the head of relevancy, the question is not as to the weight of the evidence, but whether it tends at all to illustrate the issue.

“The presence of Mrs. Lyon in the street, and the absence of all other persons by whom the act might have been committed, were strong probabilities that the brickbat was cast by her. Taken in connection, does the fact, if such was the fact, that her husband entertained towards the defendant, feelings of hostility, and had, in her presence, made threats against him, constitute another probability against her? Would she have been less likely to have cast the brickbat, had the relations between her husband and the defendant been friendly? Or, in other words, guided by our observation and experience of the motives and relations by which human action is ordinarily influenced, can we affirm to a moral certainty,

that Mrs. Lyon could not have been influenced by the unfriendly relations existing between her husband and the defendant? It certainly is not contrary to human experience to find a unity of feeling and action accompanying the family relation. Feuds descend from father to son. An injury to one, is an injury to all. The honor of one, is the honor of all. It certainly is not contrary to human experience for the wife to sympathize with her husband, to share his feelings, to look upon his enemies or friends as her's also. Such are the teachings of our instincts, and of our observation and experience.

"Suppose, on coming to the street, the defendant had found two women instead of one, of equal respectability and character, one of whom must have cast the brickbat, one the wife of his friend, the other of his enemy, would not the friendship of the one and the enmity of the other, constitute probabilities to be taken into account in determining which perpetrated the act? Other probabilities being equal, as we have supposed, no one would hesitate to say that the act had been committed by the wife of the defendant's enemy, and not by the wife of his friend."

Between these cases and the present, I can draw no distinction. If they were correctly decided, and I think they were, the Court below erred in this case. No fact or circumstance ought to be excluded from the jury, unless the Court is clearly satisfied that the jury can find no rational presumption upon it.

If the jury believe the testimony of Mrs. Lowery, they will, of course, pay no attention to these threats; but if there is any ground to doubt the accuracy of her testimony, they may, for the reasons given in the foregoing cases, look to these threats as affording some light, though dim, upon the question whether the deceased first assaulted the defendant.

Upon these grounds I concur in the judgment.

Judgment reversed.

NOTE.—We shall add extracts from two or three cases on the subject of threats, and then present those cases which discuss more immediately the question, under what circumstances evidence of the character of the deceased or prosecutor for violence is admissible.

The case of *Chambers v. Porter*, 5 Coldw., (Tenn.) 273, was an action brought by the defendant in error, in his lifetime, for the wrongs and injuries of which he afterwards died. At the September Term, 1867, there was a verdict and judgment for the plaintiff below, from which the defendant appealed. Judge LUCIEN L. HAWKINS, presiding.

MILLIGAN, J., delivered the opinion of the Court:

On the 23d of October, 1865, Robert P. Chambers, the plaintiff in error, shot and mortally wounded Isaac R. Porter. The latter lived only five days, and then died from the wound. But before his death, he brought an action of trespass, *vi et armis*, in the Circuit Court of Carroll county, against Chambers, for "illegally shooting and mortally wounding him," laying his damages at ten thousand dollars.

The process was returned to the January Term, 1866, when the declaration was filed, without revivor, in the name of the original plaintiff. The defendant appeared and pleaded to the declaration, "not guilty," and a special plea of justification; in which he alleges that the shooting was done in his necessary self-defence.

* * * * *

In the process of the trial, the Circuit Judge, upon motion of the plaintiff's attorney, excluded the statements of the witnesses, Bennett and Johnson, who proved that, on the day of the killing, and the day previous, they heard the deceased making threats of violence against the defendant, Chambers. These threats were excluded, on the ground that they were not communicated to the defendant before the shooting; and the action of the Court in this respect, is also assigned as error.

It is clear that no words of provocation will justify an assault; nor will former threats or insults palliate an assault and battery; or ordinarily, in a civil action, be received in mitigation of damages, unless they are so recent as to constitute a part of the *res gestæ*. 2 Greenleaf's Ev., 267; *Lee v. Woolsey*, 19 John. R., 318; 1 Hilliard on Torts, 206, note a.; 1 Phillips on Ev., 748, marg. note. 197.

But it is insisted, the evidence of the antecedent threats of the deceased, were admissible, under the defendant's plea of justification, as tending to show the *animus* of the deceased, and thereby superinduce the belief in the defendant that he was in danger of life, or great bodily harm, and therefore justified in taking the life of the plaintiff. We are unable fully to concur in this proposition. The rule of law which will excuse a homicide, as declared by this Court, in the case of *Rippy v. The State*, 2 Head, 217, [*ante*, p. 345.] is as follows: "The law on this subject is, that to excuse a homicide, the danger of life, or great bodily injury, must either be real, or honestly believed to be so at the time, and upon sufficient grounds. It must be *apparent and imminent*. Previous threats, or even acts of hostility, how violent soever, will not of themselves, excuse the slayer; but there must be some words or overt acts at the time, clearly indicative of a present purpose to do the injury. Past threats and hostile actions, or antecedent circumstances, can only be looked to in connection with present demon-

strations, as grounds of apprehension. To constitute the defence, the belief or apprehension of danger must be founded on sufficient circumstances to authorize the opinion that the deadly purpose then exists, and the fear that it will *at that time*, be executed."

The question in this class of cases, is always one of reasonable apprehension; and to justify or excuse a homicide upon such ground, a case must not only be made out to authorize the fear of death or great bodily harm; but such fear must be really entertained, and the act done under an honest and well-founded belief that it is absolutely necessary to kill at this moment, to save himself from a like injury. *Morris v. Platt*, 4 Amer. Law Register, New Series, 523. [*Post.*] The character of the deceased for violence, as well as his animosity to the defendant, as indicated by words and actions at the time, and before that time, are all proper matters for the jury, in the determination of the question of reasonable apprehension. But how antecedent threats, not so recent as to constitute a part of the *res gestæ*, which were unknown to the defendant at the time of committing the act, can, in the slightest degree, contribute to the formation of a well-grounded belief in the defendant, that he was in danger of life or limb, is more than we can comprehend. If the question was a question of malice, the rule under some circumstances might be otherwise, and antecedent threats be admissible on a question of damages, or to establish the identity of the person committing the act. 2 Hilliard on Torts, 78, note a. But such is not the question in the present case, or the grounds upon which the evidence is offered. It is in justification of the act, or tending to establish such justification: and we know of no reason or authority under the facts of this case, by which the evidence was admissible, unless communicated to the plaintiff. 1 Hilliard on Torts, 206, note a.

It may be added that this case, so far as it establishes the doctrine, that threats made by the slain before the killing, and not communicated to the slayer, are not competent evidence for the slayer, has been overruled in Tennessee, by the subsequent case of *Little v. The State*, *ante*, p. 487.

In *Newcomb v. The State*, 37 Miss., 383, the defendant was indicted for murder and convicted. The deceased was shot down deliberately, while sitting on a wagon-load of wood, and does not appear to have been making any demonstration, or using any language to the defendant. The theory of the defence seems to have been mental derangement, produced by a severe beating the accused had received at the hands of the deceased, some six weeks before. Evidence of this transaction was admitted, but evidence of previous threats made by the deceased against the accused, but not communicated to him before the killing, having been offered and excluded, and these rulings, having been assigned as error, were disposed of as follows in the High Court. HANDY, J.: * * * "The third assignment of error relates to the exclusion of the testimony offered in behalf of the accused, and set forth in the second bill of exceptions. This testimony was in substance, that about six weeks or two months before the killing, the deceased had commenced a quarrel with the accused, during which the deceased assaulted the accused and struck him one or two severe blows on the head, with a loaded cane, which felled him to the ground, inflicting a severe wound on his forehead. That the witness and others helped the accused up, and took him to water in a branch which was near, to wash off the

blood and the accused stepped into the water, and the witness pulled him back, and told him to stop and wash off the blood; and he asked how the blood came on him, and when told that deceased had struck him, he enquired what he had struck him for, as he had nothing against the deceased. And in order to show the relevancy of this testimony, other witnesses were offered to prove that the deceased said on that day, that he expected he had killed the accused and would have to leave the country; that if he had not, he would kill him, that he afterwards said that he had not killed the accused but would do so, if he ever crossed his path. It was admitted by the accused that these threats of the deceased were not communicated to him before the killing. This evidence was excluded, except that part of it which related to the assault and beating with the cane, and the conduct and conversation of the accused when taken to the water, and whilst the witness was washing off the blood; and this part of the testimony was allowed to go to the jury, in order to show the condition of the mind of the accused, and upon the subject of his sanity.

"It is insisted that the testimony thus rejected was competent to show the intent with which the killing was done, by presenting to the consideration of the jury, the cruelty and ferocity of the conduct of the deceased in assaulting and beating the accused, showing the character of the deceased, and the just apprehension of the accused at the time of the killing, that he was then in danger of his life, or of great bodily harm from the deceased. But this view is wholly untenable. It does not appear, from the evidence, that the deceased made any hostile demonstrations against the accused at the time of the killing, nor even that the threats, which he had previously made against the accused, were known to the accused. The latter had no reason to believe that the feelings of hostility which caused the deceased to assault and beat him on a previous occasion, still continued in his mind, much less that there was danger of a deadly assault upon him by the deceased at the time of the killing. It is well said by Chief Justice RUFFIN, 'The belief that a person designs to kill me, will not prevent my killing him from being murder, unless he is making some attempt to execute his design, or, at least, is in an apparent position to do so, and thereby induces me reasonably to think that he intends to do it immediately.' *State v. Scott*, 4 Ired., 415, [*ante*, p. 163.] In this case, the accused could not reasonably have acted upon such a belief at the time; for the deceased was unarmed, and does not appear to have been in possession of any instrument with which to make a deadly assault, and the accused was armed with a gun and pistol, and was so located towards the deceased that he could readily have used his arms in case of any hostile demonstration on the part of the deceased.

"The effect of this evidence, had it gone to the jury, might have been, then, to operate in justification of the killing, by the mere fact that the deceased had severely beaten the accused some six weeks or two months previously; which would have been clearly incompetent. The testimony was, therefore, properly excluded."

The effect which ought to be given to evidence of threats in trials for homicide is fully passed upon in *Wall v. The State*, 18 Tex., 682.

Wall met Prayter and dunned him for some money. Prayter denied owing him any money. Wall insisted that he did, and Prayter replied, "Its

a damned lie," or "You are a damned liar." Wall immediately drew a knife, called a hack-knife, and stabbed Prayter under the ribs, of which he died. This was on the 29th of May. Wall was immediately pursued and arrested; was indicted the next day; June 2d, a special venire was summoned and the list furnished him. Being unable to employ counsel, two members of the bar were appointed to defend him. June 3d, the case was called for trial, when the defendant presented an affidavit for a continuance, alleging that he could not safely go to trial for want of the testimony of James T. Kelly, by whom he expected to prove that Prayter had made threats against him. It was held by the Supreme Court, WHEELER, J., that the motion was properly refused—

1. Because it did not appear that the attendance of the witness might not have been procured, or that he could not prove the facts by other witnesses;

2. Because testimony of mere threats of the deceased, would have been, if received, no extenuation of the crime.

We shall, in the index, make a summary, giving briefly what appears to be the result of the cases included in this volume on the doctrine of threats; showing—

1. Under what circumstances evidence of previous threats made by the plaintiff, prosecutor or deceased, in trials for homicide or prosecutions for assault or actions for civil damages, is admissible:

(a). Where the threats were communicated to the defendant before the assault or killing;

(b). Where the threats were not communicated to the defendant prior to the assault or killing.

2. The effect which ought to be given to such threats as evidence.

TACKETT v. THE STATE.

[1 HAWKS, 210.]

*Supreme Court of North Carolina, December
Term, 1820.*

JOHN LOUIS TAYLOR, *Chief Justice.*

JOHN HALL,
LEONARD HENDERSON, } *Judges.*

HOMICIDE—CHARACTER OF DECEASED FOR VIOLENCE.

1. It is competent for one charged with the murder of a slave, where the

proof of the killing is circumstantial only, to give in evidence, that the deceased was turbulent, impudent and insolent to white persons. [See the next case, where this case is examined and limited.]

2. What degree of danger will *excuse* a homicide; and what degree of provocation will *extenuate* it to manslaughter.

Indictment for the murder of a slave. The prisoner offered to prove that the deceased was a turbulent man, and that he was insolent and impudent to white persons; but the Court refused to hear such testimony, unless it would prove that the deceased was impudent and insolent to the prisoner, in particular.

TAYLOR, Ch. J., delivered the opinion of the Court:

After stating the points, he observed, that it does not appear, from any direct proof in the case, what was the immediate provocation under which the homicide was committed. The evidence relative to that is altogether circumstantial and presumptive, and its weight and effect required the most careful examination and deliberation of the jury. The conclusion they might arrive at, was all-important to the prisoner, since the degree of the homicide depended upon it; and whether it was malicious, extenuated or excusable, must have been determined by them from such lights as they could gather from the facts, actually proved, and such inferences as they might deduce from them. It cannot be doubted, that the temper and disposition of the deceased, and his usual deportment towards white persons, might have an important bearing on this enquiry, and according to the aspect in which it was presented to the jury, tend to direct their judgment as to the degree of provocation received from the prisoner. If the general behavior of the deceased was marked with turbulence and insolence, it might, in connection with the threats, quarrels and existing causes of resentment he had against the prisoner, increase the probability that he had acted under strong and legal provocation. If, on the contrary, the behavior of the deceased was usually mild and respectful towards white persons, nothing could be added by it to the force of the other circumstances. They must still

depend upon their own weight, and the probability be lessened that the prisoner had received a provocation sufficient in point of law to extenuate the homicide. The evidence, therefore, ought to have been received, and this will be the more apparent when the charge to the jury is considered.

[The remaining portion of the opinion considers (1) what degree of danger will *excuse* a homicide, and the rule is said to be, that in order to reduce a homicide to excusable self-defence, it is incumbent on the accused to prove that he killed his adversary through mere necessity, in order to avoid immediate death; and (2), what degree of provocation will *extenuate* a homicide to manslaughter, and the sound principle is said to be, that if any assault made with violence or circumstances of indignity upon a man's person, be resented immediately by the death of the aggressor, and he who is assaulted act in the heat of blood, and upon that provocation, it will be but manslaughter; and, also (3), what degree of provocation on the part of a slave toward a white man will extenuate the killing of such slave, and the rule is laid down, that a *less* degree of provocation on the part of a slave than on the part of a white man will suffice, and that in such a case, a charge "that a slight blow, not threatening death or great bodily harm, will not extenuate a homicide, if the weapon be a deadly one," is erroneous.]

NOTE.—The rule of evidence declared in this case, in behalf of a white person, indicted for the murder of a slave, was held not to obtain where a slave was indicted for the murder of his overseer, so far as to admit evidence of the violence and cruelty which characterized deceased in the general management of slaves; and one of the reasons given for the exclusion of this testimony was, that to admit it would be in contravention of the policy of slavery. *Wesley's case*, *ante*, p. 319. How far the law of homicide was affected by slavery, constituted at one time an interesting chapter in American criminal law. See Whart. Hom., 286. But the learning on that subject is now a thing of the past.

In *Bottoms v. Kent*, 3 Jones' Law (N. C.), the principal case is said by PEARSON, J., to be overruled by *Tilly's case*, or "so emasculated as not to be able to generate a principle, and is expressly confined to its peculiar circumstances. * * * Indeed, *Tackett's case* is not supported by any authority, either in the English reports or in our own, and the judges yielded to the

seeming hardship in the application of the general rule. Had the case been reversed, so as to present the question, was it admissible for The State to prove the deceased was mild and submissive in his temper, we presume an exception would not have been made to the general rule."

THE STATE V. BARFIELD.

[8 IREDELL, 344.]

Supreme Court of North Carolina, June Term, 1848.

THOMAS RUFFIN, *Chief Justice.*
 FREDERICK NASH, }
 WILLIAM H. BATTLE, } *Judges.*

HOMICIDE—EVIDENCE OF CHARACTER OF DECEASED FOR VIOLENCE.

1. On a trial for murder, evidence of the general character and habits of the deceased as to temper and violence cannot be received, unless, possibly, in cases where the evidence as to the homicide is wholly circumstantial. [Tackett's case, *ante*, last case, criticized. Acc. Wesley's case, *ante*, p. 319; Wright v. State, *ante*, p. 484, note; Field's case, *post*; and other cases collected in the note to Lamb's case, *post*.]

2. BATTLE, J., dissenting: 'Testimony of the character of the deceased for violence may be offered by the prisoner in all cases, where the enquiry is, whether he acted from malice or upon legal provocation or excuse. [Acc. Copeland's case, *ante*, p. 41; Robertson's case, *ante*, p. 151; Cotton's case, *ante*, p. 310; Rippy's case, *ante*, p. 345; Monroe's case, *ante* p. 487; Robert Jackson's case, *ante*, pp. 476, 486; Little's case, *ante*, p. 487; Keener's case, *ante*, p. 546; Quesenberry's case, *ante*, p. 549, note; Tackett's case, *ante*, last case; Pritchett's case, *post*; Franklin's case, *post*; and see Lamb's case, *post*; and other cases collected in the note to the same.]

The prisoner was indicted for the murder of Alfred Flowers; was tried and convicted, but, upon an appeal to the Supreme Court, the judgment was reversed, and a *venire de novo* awarded. 7 Ired., 299.

Mrs. Flowers, widow of the deceased, stated that the prisoner came to her husband's about one o'clock of the day on which the homicide was committed; that he and her husband appeared to be friendly, and her husband

invited him to drink ; that, shortly afterwards, a quarrel arose between them, in consequence of some offensive language used by the prisoner, and after a short time, she heard her husband complain to the prisoner that he had cut his pantaloons ; and the witness said the pantaloons were cut, but she did not see by whom, or how it was done ; that the parties then appeared to become friendly, and continued to drink together until her husband became very drunk, and the prisoner excited by liquor, but not drunk ; that the prisoner and her husband were connected by the marriage of the former with an aunt of the latter, and, that the latter frequently called him Uncle Jack ; that towards night, another quarrel arose between them, and her husband went out of doors, when the prisoner shut the door on him, and refused to let him come in ; but upon her husband's getting a pestle to beat down the door, and her interposition, the door was opened ; that her husband then took a chair and sat down, and told the prisoner that he had come there uninvited, and he might take the road and go home ; that the prisoner then commenced giving the damned lie to everything said by her husband or herself ; that her husband rose from his chair, saying he could not stand it, and, as he did so, the prisoner came towards him with his knife drawn, and thrusting it at him ; that her husband, thereupon, raised his chair and pitched it over the prisoner's head, without intending, as she thought, to strike him ; that, in the effort to throw the chair, her husband staggered and fell, upon which the prisoner instantly rushed upon him, and gave him several stabs while he was down ; that she assisted him to rise, and he went towards the door, where the prisoner followed, and stabbed him once or twice more in the back ; that she then assisted him to the bed, upon which she laid him down, and soon after he died. She also testified, that the prisoner mocked her, and said he had laid Alfred cold.

On the part of the prisoner, Robert Flowers, a son of the deceased, fifteen or sixteen years old, testified ; That

he was not at home until late in the day on which the homicide was committed; that when he went into the house, he saw the prisoner sitting on the table with a gun in his hand, and that he requested the prisoner to give it to him, and he immediately complied; that he went out of doors, and when he came back, he found the prisoner lying on the bed; that his father sent him to draw some liquor, and when he returned, he found his father sitting on a chair near the door; that some angry words passed between his father and the prisoner, and that the latter was standing near the middle of the room, and cursed the liquor; that his father rose up and took a light chair in his hand, and pitched it over the head of the prisoner, without touching him, and, as the witness believed, without intending to strike the prisoner; that, in doing so, his father staggered and fell, when the prisoner rushed upon him instantly and stabbed him; that he did not see the prisoner have a knife in his hand, when he first came towards his father, but he saw the prisoner draw it from his pocket at or about the time his father raised the chair; that immediately after his father was stabbed, he got up and went towards the door, and the prisoner followed him and stabbed him in the back, and his father then went to the bed, laid down, and in a few minutes, died; that he did not see his mother assist his father to get up, or to get to the bed, and that he thought if it had been so, that he would have seen it; that, after his father was dead, he went out of the house, and saw the prisoner at the gate, and asked him why he had killed his father; to which the prisoner replied, "that if he did not clear out, he would send him off with a cut throat."

John Flowers, a son of the deceased, still younger, testified for the defendant substantially the same as his brother, except, that he said the prisoner was advancing on his father when he raised the chair.

The counsel for the prisoner then offered to prove, by a witness who had formerly lived with the deceased, that his general character was that of a violent, over-

bearing and quarrelsome man, and that such were his domestic habits; but, the State objecting, this evidence was rejected.

An unsuccessful effort was made to impeach the testimony of Mrs. Flowers. The counsel for the prisoner urged before the jury, that she was not entitled to credit, and that, taking the case on the testimony of the two sons, there was such a provocation as mitigated the killing to manslaughter.

The Judge charged the jury that, if Mrs. Flowers was to be believed, the killing was murder. But, if they did not believe her, then they would look to the testimony of Robert and John Flowers, in order to ascertain the degree of the homicide; and, in regard to their testimony, the Court stated to the jury, that, if the deceased pitched the chair over the head of the prisoner, without intending to strike him, and that was manifest to the prisoner, then there was no such legal provocation as would mitigate the killing to manslaughter; but the prisoner would, in that view of the case, be guilty of murder.

The jury found the prisoner guilty of murder; and the counsel for the prisoner, besides an objection not necessary to note, moved for a *venire de novo*, (1), because the jury were misdirected; (2), because of the exclusion of the evidence of the violent character of the deceased.

RUFFIN, Ch. J., delivered the opinion of the Court:

[After reviewing the facts of the case, and concluding that in the instructions there was no error to the prejudice of the prisoner, he proceeded:]

It is of great importance to the due dispatch of business, and the correct decision of controversies, that no evidence should be heard which is foreign to the issue; and this rule is no less applicable and useful in criminal, than in civil cases, Upon this principle, and because, if received, the evidence of the general character and habits of the deceased, as to temper and violence,

could not rationally and legally affect the degree of homicide in this case, but might mislead the jury, the Court holds that it was properly excluded.

The law no more allows a man of bad temper and habits of violence to be killed by another, whom he is not assaulting, than it does the most peaceable and quiet of men. But it is said, that it ought to be heard as some evidence to weigh with the jury; that the deceased being, habitually, a brawler and breaker of the peace, was, probably, in this particular controversy, the aggressor, or, at least, that the slayer might, for that reason, have thought himself in danger from him, and acted on that apprehension. Now, no such principle or decision is found, as that a person may kill another, because from his former course of life as a fighter, he apprehends an assault from him, though it be even a violent one. A person may, indeed, receive such sure information of the intention of another to attack his life upon sight, as to cause him fully to believe it; and, in a moral point of view, he may, in such cases, be excused for getting the advantage on a favorable opportunity, and killing first, or even for seeking private means of killing the other, in order, as he thinks, to save his own life. The pardoning power would, doubtless, be strongly moved by those palliating considerations, to stay the punishment annexed by the law to the offence. But, it is clear that the legal guilt would be that of murder; because there was not, at the time, a pressing necessity to kill, arising out of an assault, and immediate danger to the person killing, nor any accompanying provocation to arouse the passions, and acted on before the passions had cooling time.*

It would be murder, because the killing would be deliberate; and we know of no deliberate killing that is not murder, unless it be commanded by the law, or justified by the urgent necessity of self-defence, when the party is in impending peril of the loss of life, or great bodily harm, from an actual and unavoidable combat.

* Acc. Scott's case, *ante*. p. 163.

It is too much to stake the life of one man upon the fears of another of danger from him, merely upon his character for turbulence, and when he is making no assault. Such would be the case here, if the evidence had been received; for the prisoner's own witnesses proved that there was no assault on him. It is the fact, and not the fear of an assault, that extenuates the killing, upon the supposition that it instantly arouses the resentment to an uncontrollable pitch. It is possible, where the case is one of circumstantial evidence, and there is no direct proof of the quarrel and combat, that evidence of the character of the deceased might be mercifully left to the jury, in aid of their enquiries into the origin and progress of the conflict, in which the prisoner took the other's life. It was allowed, and, on that principle, in Tackett's case,^b 1 Hawks, 211. That is the only instance, in which even in a case of circumstantial evidence, such proof was held to be proper, as far as our researches and those of the bar have discovered. It is stated in the notes in the American edition of Phillips on Evidence, as a solitary case, and as one, in which the Court admitted that such evidence must be confined to the killing of slaves. Cowen & Hill's notes to Phil. on Ev., 461, note 345. Although the case is not, we think, obnoxious to the sneer of the annotator, in respect to its application to the killing of slaves alone, yet, we cannot act on it as an authority in this case. It does not profess to be founded on any precedent, and the reasoning of the Court confines its application to the case of presumptive evidence before it, in which there was "not any direct proof" of the immediate provocation or circumstances under which the homicide was committed. In such a case, the Court say, "if the general behavior of the deceased was marked with turbulence and insolence, it might, in connection with the threats, quarrels and other existing causes of resentment against the prisoner, *increase the probability*, that the latter had acted under strong and legal provocation; while, on the

^b Ante, last case.

contrary, if the behavior of the deceased was usually mild and respectful towards white persons, nothing could be added by it to the force of *the other circumstances*." It is plain, therefore, that the decision is put distinctly upon the ground, that the case was one of circumstantial evidence only, in which the existence or want of provocation was matter merely of presumption, to be deduced, therefore, by the jury, from every slight thing that could add a shade to the presumption favorable to the accused. The case has never come directly under consideration hitherto; though it was urged in Tilly's case,³ 3 Ired., 424, where evidence nearly of the same kind was rejected, and in which the Judges meant to intimate their doubts of it by saying, that temper and deportment, "if they were evidence at all," were to be established as facts, and not by reputation.⁴ But, whether Tackett's case be law or not, it has no application here; because, this is a case of the opposite kind—one in which three witnesses were present, from beginning to end, who deposed directly to the different occurrences—and even those who were called by the prisoner prove, affirmatively, that the deceased did not make an assault, or give the prisoner any legal provocation, but that the prisoner was the aggressor.⁵ What possible, legitimate end, could evidence of the character and temper of the deceased answer in that state of facts? If good, and there was direct evidence that the deceased assaulted the prisoner, it would not aggravate the prisoner's guilt, and make it murder. So, if bad, it could not mitigate it to manslaughter, where it appears directly, that, notwithstanding his temper, he was, for that time, at all events, not in fault, but that

³ *Post*, note to Lamb's case.

⁴ But see note c. to Keener's case, *ante*, p. 547.

⁵ But why was the defendant put to the disadvantage of calling these children of the person slain, and making them his own witnesses? In the very nature of the case, they were the State's witnesses; and, it would seem, that the State's attorney should have been required to call and examine them in behalf of the State. See Hurd's case, *post*, where the rule of practice in such cases is stated.

the prisoner was. The evidence of the deceased's character neither disproves the facts proved by the witnesses, nor impeaches their credibility. For these reasons, and because, we think, if there were any such general rule of evidence, as that urged for the prisoner, it would have been laid down in some one of the numerous treatises on this branch of the law, the Court hold the evidence was properly rejected.

* * * * *

BATTLE, J., dissenting: I cannot concur with the majority of the Court upon the question of the admissibility of the testimony offered by the prisoner, to show the character of the deceased for violence. It is with unaffected diffidence that I place my opinion in opposition to their's; but, in doing so, I am consoled by the reflection, so often felt and expressed by judges placed in a similar situation, that the conclusion to which I have been led, however erroneous, will, at least, be harmless.

A homicide committed otherwise than by virtue of a legal precept, must be either murder, manslaughter, or excusable homicide. With malice, it is murder; and even in the absence of express malice, it is still murder, unless the prisoner can show, from the attendant circumstances, that it was prompted by legal provocation, committed by accident, or rendered necessary in self-defence. Every fact and circumstance which surround the main fact of the homicide, become, therefore, matters of vital importance, and ought to be admitted in evidence when they can throw the least light upon it. It seems to me that the character of the deceased for violence, is one of those attendant circumstances, which will always have some, and often an important bearing upon that which must necessarily be the subject of investigation; that is, what were the motives which impelled the slayer to act. Take first the case where the prisoner defends upon the ground that he killed his assailant in his necessary self-protection. To sustain his defence, he must show to the satisfaction of the jury, he was assailed, and that he had retreated as far as he could with safety to his own life,

before giving the mortal stroke, or that the violence of the assault was such that retreat was impracticable.

Is it not manifest that his apparent danger would depend much upon the character of the assailant for mild and amiable temper, or for violent and ungovernable passion? With an assailant of the former character, he would have little to fear, under circumstances in which, with the latter, his life would be in great peril. Let it be recollected, too, that he has to judge and to act at the instant, upon the most tremendous responsibility. If he strike too soon, he is condemned to a felon's death upon the gallows; if he strike too late, he falls by the hand of his adversary. Surely the jury who tries him, ought not to require from him proof of the same forbearance when attacked by a man of blood, as when attacked by a man of peace. His danger would, undoubtedly, be greater in the one case than in the other. Why, then, not allow him to prove it? There is certainly nothing in the nature of the testimony which ought to forbid it. Proof of the superior physical strength of the deceased, is always admitted.¹ Why, then, not admit proof of that which gives to the physical strength much of its force and all of its danger? It appears to me, too, that the privilege which the prisoner has of giving in evidence his own peaceable general demeanor, is of an analogous nature. Testimony of the kind is not only admissible for the prisoner, but it is said by very high authority, that it is often testimony of much weight. Chief Justice HENDERSON says, in the case of the State v. Lipsey, 3 Dev., 493, that the peaceable and orderly character which the prisoner had ever borne, had, I think, *more than* "but little weight," which the judge in the Court below had been disposed to allow, when the facts, attending the homicide, had been positively sworn to. The character of the prisoner is offered only as presumptive evidence, and the character of the deceased is offered for no more; but as presumptive evidence, it does

¹ Acc. Selfridge's case, *ante*, p. 1; Copeland's case, *ante*, p. 41; Benham's case, *ante*, p. 115; Hinton's case, *ante*, p. 83; Wells' case, *ante*, p. 145, and others.

seem to me to be as strong, and, therefore, ought to be as readily admitted as the other.

If I have been successful in showing that the testimony of the violent character of the deceased ought to be admitted for the prisoner, when he defends upon the ground of killing in self-protection, the same process of reasoning will lead to the conclusion, though in a less striking manner, that it ought to be admitted to show that the prisoner acted upon a legal provocation. That, which would be considered legal provocation, when offered by a man apt to strike and ready to shed blood, might, very properly, not be so regarded when offered by one of a contrary disposition. But it is said that the right to kill does not depend upon the character of the slain—that the law throws its mantle of protection equally over the violent and the gentle, as the rain falls from heaven, equally upon the just and on the unjust. That is admitted, but it proves nothing. It is true that the killing of a violent and blood-thirsty man, without provocation or excuse, is as much murder as the killing of any other person; but in ascertaining the fact whether there was such provocation or excuse, I contend that the character of the violent man affords important presumptive testimony in favor of the accused. It is urged again, that where the proof is positive and clear, that there was no legal provocation, the evidence of character can have no effect, and on that account ought to be rejected. To this I answer, that, plenary proof on one side can never justify the rejection of testimony, otherwise competent, on the other. The argument confounds the *effect* and the *competency* of testimony. Testimony which is competent, which may be introduced at all, may be introduced, no matter how little may be its effect—nay, even, if it be perfectly manifest in the particular case that it can have no effect whatever. It is urged, further, in the case before us, that the jury have found that there was no legal provocation, and, therefore, the evidence must be rejected as being entirely immaterial and useless. The reply is, that it was offered *before the jury had so found*, and if

it had been admitted, it is possible that their deliberations might have led them to a different conclusion.

But it is urged, finally, that there is no authority in favor of the admissibility of such testimony. However this may be elsewhere, I contend that it is not so in this State. In the case of the State v. Tackett,^a 1 Hawks., 210, the prisoner was indicted for the murder of a slave. No witness was present when the homicide was committed; and the testimony against the prisoner, consisted, principally, of his declarations, and of circumstances connected more or less remotely with the transaction. In the progress of the cause, the prisoner offered to prove "that the deceased was a turbulent man, and that he was insolent and impudent to white people;" but the Court refused to hear such testimony, unless it would prove that the deceased was insolent and impudent to the prisoner in particular." The prisoner, having been convicted, and having appealed to this Court, it was decided that the testimony was proper, and ought to have been admitted. TAYLOR, Chief Justice, delivered the unanimous opinion of the Court, in which, after remarking upon the character of the testimony, and the nature of the enquiry, he said: "It cannot be doubted that the temper and disposition of the deceased, and his usual deportment towards white persons, might have an important bearing upon the enquiry, and, according to the aspect in which it was presented to the jury, tend to direct their judgment as to the degree of provocation received by the prisoner. If the general behavior of the deceased was marked with turbulence and insolence, it might, in connection with threats, quarrels, and existing causes of resentment, he had against the prisoner, increase the probability that the killer had acted under a strong and legal provocation." Here, there is a case in which it was distinctly declared, that the character of the deceased might be offered in evidence in behalf of the prisoner.

An attempt is made to destroy the effect of this decision, and of its applicability to the case before us, by say-

^a *Ante*, last case.

ing that it is an authority only in a case where the deceased was a slave, and where there was no direct testimony as to the provocation under which the prisoner acted. To the first of these objections, the reply is, that the Court certainly did not assign the fact of the deceased being a slave, as a reason for admitting the testimony. It is true that a slighter cause would be a legal provocation in the case of a slave, than in the case of a white man; but they did not intimate that the provocation was to be proved by a different kind or degree of testimony. The second objection is better founded; but I can see no reason for the distinction. The testimony as to character, may, perhaps, be stronger in the case where there is no direct and positive evidence as to the provocation, than where the evidence is only circumstantial; but its object and its office are the same in both cases; that is, to ascertain whether the slayer acted upon, or without, a sufficient provocation. If admissible, then, in one case, it ought not to be rejected in the other.

Upon the whole, I am of opinion that the testimony of the character of the deceased for violence, may be offered by the prisoner, in all cases, where the enquiry is whether he acted from malice, or upon legal provocation or excuse.

Judgment affirmed.

THE STATE V. FIELD.

[14 MAINE, 244.]

Supreme Judicial Court of Maine, April Term, 1837.

NATHAN WESTON, *Chief Justice.*

NICHOLAS EMERY, } *Justices.*
 ETHER SHEPLEY, }

HOMICIDE—CHARACTER OF DECEASED FOR VIOLENCE.

It is not competent for one indicted for manslaughter to prove, on the trial, that the deceased was well-known, and understood, generally, by the accused and others, to be a drunken, quarrelsome, savage and dangerous

man. [Acc. Barfield's case, *ante*, last case; Wesley's case, *ante*, p. 319; Wright v. State, *ante*, p. 484, note; Fields' case, *post*; and other cases collected in the note to Lamb's case, *post*. Contra, Copeland's case, *ante*, p. 41; Robertson's case, *ante*, p. 151; Cotton's case, *ante*, p. 310; Rippy's case, *ante*, p. 345; Monroe's case, *ante*, p. 467; Robert Jackson's case, *ante*, pp. 476, 486; Little's case, *ante*, p. 487; Keener's case, *ante*, p. 546; Quesenberry's case, *ante*, p. 549, note; Tackett's case, *ante* p. 615; Pritchett's case, *post*; Franklin's case, *post*; Lamb's case, *post*; and other cases collected in the note to the same.]

Hanson Field was indicted for manslaughter, in killing one Nathaniel Field, on the 22d of December, 1835. The prisoner and the deceased both occupied different parts of the same house. It appeared, at the trial, that the prisoner and the deceased had both been drinking on that day, and had had a violent quarrel about half an hour before the one in which Nathaniel was killed, in which both were badly injured, the injury to Nathaniel having been inflicted with an axe. Afterwards, Nathaniel, who was a much younger, and more vigorous man, than the prisoner, went into a room in the part of the house occupied by the prisoner, but which each had an equal right to occupy, where the prisoner was, and, immediately on entering, was struck by the prisoner with an axe, and instantly killed. It was proved, that Hanson Field was passionate, and accustomed to use threatening language, when intoxicated, but was not considered dangerous; and that, when sober, he was a kind and peaceable man, and a good neighbor.

The counsel for the prisoner offered to prove, that the deceased was a man in the habit of drinking to excess, whenever he could get rum, and, that drinking spirits of any kind, uniformly had the effect to make him exceedingly quarrelsome, savage and dangerous; that he had, when in liquor, frequently threatened the life of his wife and others; and that the prisoner had, more than once, been called upon to protect his wife and family from his drunken fury; and that his habits and character were well known and understood by all about him.

EMERY, J., who presided at the trial, refused to permit this evidence, and ruled, that no evidence of his drinking or habits could be received at any other time, than

on the day that the deceased was killed. The verdict was, "guilty." To this ruling and decision of the Judge, the counsel for the prisoner excepted.

W. P. Fessenden, for the prisoner, said, that guilt or innocence depended on the state of mind and motives of men. To ascertain this, the evidence offered was pertinent and proper. The accused had the right to show such facts as would convince the jury, that he had good reason to believe, from his knowledge of him, that the deceased would kill him, unless he protected himself. If the accused thought, from his knowledge of the character and conduct of the deceased, when he broke into the room, that his own life was in danger, he was justified in cutting him down for the preservation of his own life. The evidence should, then, have been admitted. The authorities go to that extent. 5 Yerger, 459;^a U. States v. Wiltberger,^b 3 Wash. C. C., 515.

Clifford, Attorney-General, for the State.

The opinion of the Court, after a continuance, was drawn up by EMERY, J., as follows :

The defendant, on an indictment for manslaughter, for killing Nathaniel Field, on the 22d of December, 1835, has, by the verdict of a jury, been found guilty. In the course of the trial, evidence was proposed to be offered, that the deceased was a man in the habit of drinking to excess, whenever he could get rum, and, that drinking spirits of any kind, uniformly had an effect to make him exceedingly quarrelsome, savage and dangerous; that he had, when in liquor, frequently threatened the life of his wife and others, and, that the prisoner had, more than once, been called upon to protect his wife and family from his drunken fury, and, that his habits and character were well known and understood by all about him.

The Judge refused to admit the evidence, and ruled that no evidence of his drinking or habits, could be received at any other time than on the day aforesaid.

^a Grainger's case, *ante*, p. 238. ^b *Ante*, p. 34.

The argument of the defendant's counsel is: that if the defendant had good reason to believe, that Nathaniel, the deceased, intended to kill him, and that he burst open the door with that intent; that the evidence of the savage and dangerous character of Nathaniel, when in liquor, and his habit of drinking ardent spirits, should have been admitted, to relieve the defendant from the imputation of guilt, because, it would be inferred that he acted promptly to preserve his own life; that his motive was justifiable.

A case in 5 Yerger, 459,^c and the cases of the United States v. Wiltberger,^d 3 Washington's C. C. R., 515, and Selfridge's^e case, are cited in support of the positions assumed by the counsel for the defendant. Wiltberger's case was finally decided in the Supreme Court of the United States, on a question of jurisdiction, in favor of the prisoner, notwithstanding the verdict against him in the Circuit Court. 5 Wheat., 76. But to the law, as stated to the jury by Judge WASHINGTON, upon the branch of the case, in any degree applicable to the present topic, we cordially assent. "A man may oppose force to force in defence of his person, his family, or property, against one who manifestly endeavors by surprise or violence, to commit a felony, as murder, robbery, or the like. But to justify killing the aggressor, *his apparent intent* must be to commit a felony. That *apparent intent* is to be collected from the attending circumstances, the manner of the assault, the nature of the weapon used, and the like, and it must appear that the *danger was imminent*, and the species of resistance used, necessary to avert it."

Of the benefit of all these attending circumstances, the defendant, Field, availed himself on the trial, through the faithfulness and ability of his counsel

The trial of Selfridge took place in 1806. That of the United States v. Wiltberger, in 1819. And, perhaps, it would be doing no injustice to the high desert of the

^c Grainger's case, *ante*, p. 238. ^d *Ante*, p. 34. ^e *Ante*, p. 1.

learned Judge WASHINGTON, who presided in the latter trial, to imagine that he might have had the benefit of the lucid charge of the late Chief Justice PARSONS to the grand jury, so far as it is made known, in the commencement of the report of Selfridge's trial, as well as of the interlocutory decisions, so to speak, of Judge PARKER, and his charge on summing up to the jury of trials. The coincidence of expression is striking. PARSONS, Ch. J., had charged the grand jury, that a bare fear, however well-grounded, unaccompanied by any open act, indicative of such an intention, will not warrant him in killing.

Austin, the young man slain, was the son of a gentleman, against whom the defendant, Selfridge, had published in a newspaper a libel on the morning of the conflict. The deceased was standing with a hickory cane in his hand, near the corner of Suffolk buildings, in Boston. Having cast his eyes upon Selfridge, who was coming down, crossing State street diagonally toward the U. S. Bank, his hands behind him, outside of his coat, without anything in them, Austin shifted his cane to his right hand, stepped quick from the sidewalk to the pavement, advanced upon the defendant with his arm uplifted. As the deceased approached, the defendant put his right hand into his pocket and took out his pistol, while his left arm was raised to protect his head from an impending blow. The defendant turned, stepped one foot back, a blow fell upon the head of the defendant, and the pistol was discharged at the deceased, at one and the same instant. Several blows were afterward given, and attempted to be parried by the defendant, who threw his pistol at the deceased, seized upon his cane, which was wrested from him by deceased, who, becoming exhausted, fell down, and in a few minutes, expired.

The late learned and excellent Judge PARKER, alike distinguished for native sagacity, courtesy of manners, benevolence, and intrepidity in discharge of duty, who, previous to his advancement to the station of Chief Jus-

tice, presided at the trial of Selfridge, in charging the jury, doubted whether self-defence could, in any case, be set up, when the killing happened in consequence of an assault only, unless the assault be made with a weapon which, if used at all, would probably produce death. The stress of the case, in the Judge's mind, was, for the jury to settle whether the defendant could probably have saved himself from death, or enormous bodily harm, by retreating to the wall, or throwing himself into the arms of friends, who would protect him.

The case probably is cited more particularly to show, that the ruling excepted against was too circumscribed, because in Selfridge's case an examination was had to see whether the assault was by the procurement of the defendant, when the whole story of the misunderstanding between the defendant and the deceased's father was heard by the jury. But the Judge declared, in his charge to the jury, that he thought it was going too far back to have an influence on the trial, but which, the urgency of the Attorney-General, and the *consent* of the defendant's counsel, finally induced the Judge to admit. On the motion to admit the evidence, he observed, that his own opinion was, that nothing was proper evidence excepting what took place on the same day, or very shortly before; and, more particularly, that anything which went to show a previous quarrel with another person, or even with the same person, was not proper, the law being clear that no provocation by words would justify blows.

So far, then, as we apprehend the law on this subject, we perceive nothing in two of the cases cited by the defendant's counsel, militating with the ruling of the Judge in the case at bar. The case cited from Yerger's Reports,^s we have not been so happy as to see. We regret it the more, because of the high reputation of the Court and of the reporter. We must be contented to take the law as we find it on this side of the Alleghenies.

^sGraininger's case, *ante*, p. 238.

It would not be allowable to show, on the trial of an indictment, that the prisoner has a general disposition to commit the same kind of offence, as that charged against him. 1 Phil. Ev., 143. Although the deceased may have been a savage and quarrelsome man when intoxicated, he still was entitled to the protection of the law. He was not, from any evidence, unlawfully in the house. We look in vain among the attending circumstances of the melancholy catastrophe, for a provocation or an excuse, for the resort to the deadly weapon, which the defendant used, to destroy the life of his victim. And, to allow the introduction of evidence of the character of the deceased, and his habits of drinking at other times, and their consequences, could have no legal efficacy in reducing the crime of which the defendant stood charged, to justifiable or excusable homicide.

The permission given to the defendant, as to evidence of what transpired that day, was as liberal as the principles of the administration of criminal justice would authorize the Court to grant.

The exceptions are overruled.

PRITCHETT v. THE STATE

[22 ALA., 39.]

Supreme Court of Alabama, January Term, 1853.

WILLIAM P. CHILTON, *Chief Justice.*

DAVID G. LIGON,

GEORGE GOLDTHWAITE,

JOHN D. PHELAN,

LYMAN GIBBONS,

} *Associate Justices.*

HOMICIDE—CHARACTER OF DECEASED FOR VIOLENCE—COMMUNICATED THREATS.

1. An act performed by a quick, impulsive, blood-thirsty, abandoned

man may afford much stronger evidence that the life of a person assailed was in imminent peril, than if performed by one known to possess an entirely different character and disposition, and might very reasonably justify a resort to more prompt measures of self-preservation. In such case, the act and the status of the actor must be taken together, in order to arrive at a just conclusion respecting its nature; and thus the character of the deceased may become a legitimate subject of enquiry, as connecting itself with the transaction which it may serve to explain.

2. But however bad and desperate the character of the deceased may have been, and however many threats he may have made, he forfeits no right to his life, until, by an actual attempt to execute his threats, or by some act or demonstration at the time of the killing, taken in connection with such character and threats, he induces a reasonable belief on the part of the slayer, that it is necessary to deprive him of life in order to save his own, or to prevent some felony upon his person. [This principle is substantially declared in all the cases upon the subject, except Phillips' case, *ante*, p. 383; Carico's case, *ante*, p. 389; Bohannon's case, *ante*, p. 395, and Fields v. The State, *post*.]

3. When a homicide is committed under such circumstances as tend to show that the slayer acted in self-defence, the previous threats of the deceased, and his conduct upon the fatal occasion, construed with reference to his known character and peculiarities, having relation to such conduct and tending to explain it, all enter into, and form parts of the transaction, and may properly be received in evidence. [Acc. Copeland's case, *ante*, p. 41; Robertson's case, *ante*, p. 151; Cotton's case, *ante*, p. 310; Rippy's case, *ante*, p. 345; Monroe's case, *ante*, p. 467; Robert Jackson's case, *ante*, pp. 476, 486; Little's case, *ante*, p. 487; Keener's case, *ante*, p. 546; Quesenberry's case, *ante*, p. 549, note; Tackett's case, *ante*, p. 615; Franklin's case, *post*; Lamb's case, *post*; and cases collected in the note to Lamb's case, *post*. Contra, Wesley's case, *ante*, p. 319; Wright v. State, *ante*, p. 484, note; State v. Field, *ante*, last case; and cases collected in the note to Lamb's case, *post*.]

4. Where an ill-feeling existed between the prisoner and deceased; and the deceased had made violent threats against the prisoner which had been communicated to him, and had, the day before the killing, made an assault upon the prisoner with deadly weapons; and the prisoner loaded his gun and went to the house of the deceased, and there shot and killed the deceased, it was held, that evidence of the character of the deceased for violence was properly excluded.

Error to the Circuit Court of Madison county. Tried before the Hon. JOHN E. MOORE.

D. C. Humphreys, for plaintiff in error; *M. A. Baldwin*, Attorney-General, for the State.

CHILTON, Ch. J., delivered the opinion of the Court:

The prisoner was indicted in the Circuit Court of Madison county, for the murder of one Henry Stammers.

Upon his arraignment he pleaded not guilty; was tried, and convicted of murder in the second degree, and sentenced by the Court to confinement in the penitentiary for the term of ten years.

The proof conduced to show, that ill-feeling had grown up between the deceased and the prisoner, on account of a warrant sued out by the latter against the deceased, before a justice of the peace; that the deceased had made threats of personal violence against the prisoner, which had been communicated to him, and that, on the morning preceding the day when he was killed, the deceased had gone to the field in which the prisoner had been plowing, and, with a pistol in one hand, and a rock or stick in the other, had forbid the prisoner's going to his plow; that, just before the killing, the prisoner was seen starting from his house, priming his gun, and picking his flint, and crying; that he proceeded to the premises of the deceased, and found him near his home; told him, in a loud voice, "stop, I have come to shoot you;" that the deceased stopped and turned round, was fired at by the prisoner, and killed immediately.

The prisoner proved that he was a peaceable and orderly man, hitherto; and the same witness who proved the prisoner's good character, was asked by the prisoner's counsel, "if he knew the character of the deceased; whether he was a turbulent and quarrelsome man, or a peaceable and orderly one?" The Circuit Court, on objection of the solicitor, refused to permit the witness to answer this question, and this refusal is the only matter complained of as error.

We are referred, by the counsel for the prisoner, to the case of *Quesenberry v. the State*,* 3 Stew. & Porter, 308, as an authority favoring the admission of the proof sought to be elicited by this interrogatory. In that case, while it was admitted, that the good or bad character of the deceased could have no influence as an abstract proposition, upon the guilt of the accused, yet, it was said, there might be cases where the killing was attended with

* *Ante*, p. 549, note.

such circumstances as rendered its character doubtful, and in which the general character of the accused might sometimes afford a clue to the truth; that it was an acknowledged principle that, if, at the time the deadly blow was inflicted, the prisoner who so inflicted it had well-founded reasons to believe himself in imminent peril, without having, by his fault, produced the exigency, such killing would not be murder. The Court further says: "If the deceased was known to be quick and deadly in his revenge of imagined insults—was ready to raise a deadly weapon on very slight provocation, or, in the language of the counsel, 'his garments were stained with many murders,' when the slayer had been menaced by such an one, he could find some excuse in the strongest impulses of our nature, in anticipating the purposes of his antagonist. The language of the law in such case would be, 'obey that impulse to self-preservation, even at the hazard of the life of your adversary.'"

I have quoted thus largely from that case, in order that, upon a principle of law of so much delicacy and importance, this Court might avail itself of the occasion to limit and guard the strong expressions employed by the judge who delivered the opinion, and to correct any misapprehensions of the law to which it may have given rise. That there may be cases where the known temper and disposition of the deceased, prompting him to cruelty, deadly revenge and recklessness of human life, may be so connected with acts indicating an intention on his part to take the life of the slayer, or to inflict some great bodily harm, as to become a part of the *res gestæ*, and to justify the slayer in resorting to more prompt and energetic measures of self-defence, we do not deny. But, whatever may be a man's character for desperation and recklessness, he is entitled to the protection of the law; and it is as much a crime in the eye of the law to slay him, as it is the most peaceable and law-abiding citizen in the community. Yet, the law, having respect to the nature of man, and aiming to arrive at the true intent and

motive which characterize acts prohibited by it, allows every fact and circumstance immediately connected with the act, and which tends to elucidate and explain its nature and character, or the motive and intent which moved to its perpetration, to be given in evidence. It endeavors to adjust the measures of defence to the nature of the assault, and, in doing this, it permits the party assailed to view the assailant just as he is; for it is chiefly from a knowledge of the true condition of the parties at the time the act is done, that we can arrive at the motives which may reasonably be supposed to have influenced them. *Oliver v. the State*,^b 17 Ala. Rep., 598. An act performed by a quick, impulsive, bloodthirsty, abandoned man, might afford much stronger evidence that the life of the party assailed was in imminent peril, than if performed by one known to possess an entirely different character and disposition, and might very reasonably justify a resort to more prompt measures of self-preservation. In such case, the act and *status* of the actor must be taken together, in order to arrive at a just conclusion respecting its nature. Thus it is, the character of the deceased may become a legitimate subject of enquiry, as connecting itself with the transaction, which it may serve to explain. But, however bad or desperate that character may be, and however many threats such person may have made, he forfeits no right to his life, until, by an actual attempt to execute his threats, or by some act or demonstration at the time of the killing, taken in connection with such character or threats, he induces a reasonable belief, on the part of the slayer, that it is necessary to deprive him of life, in order to save his own, or to prevent some felony upon his person. And when a homicide takes place under such circumstances as tend to show that the slayer acted in self-defence, the previous threats of the deceased, his conduct upon the fatal occasion, construed with reference to his known character, and peculiarities, having relation to such conduct, and tending to explain it, all enter into and form parts

^b *Post*.

of the transaction, and may be properly received as evidence.

If the quotation we have made from the case of *Quenberry v. The State*, goes to support the view taken by the counsel for the prisoner in this case, namely, that because a man of "turbulent and quarrelsome disposition" has threatened to take the life of another, the party menaced may seek him out at his own house and kill him, thus "anticipating his antagonist's purposes in obedience to the impulse of his nature to self-preservation," we should not hesitate to declare that it was not the law; but, taking the whole decision together, we do not so understand it. In such case, the character of the deceased is altogether immaterial, as it affords, be it never so bad, no justification or excuse for the killing; and the Court should exclude all evidence concerning it. "The rule," says an American author, "undoubtedly is, that the character of the deceased can never be made a matter of controversy, except when involved in the *res gesta*; for it would be a barbarous thing to allow A. to give as a reason for his killing B., that B.'s disposition was savage and riotous." Wharton's Cr. L., 172;^c see, also, *State v. Field*,^d 14 Maine Rep., 248; *Commonwealth v. York*,^e 7 Law Rep., 507; *Wright v. The State*,^f 9 Yerg., 342.

Under the view of the law which we have above expressed, and the circumstances described by the proof in this cause, it is very clear the Court did not err in excluding the proof.

The judgment and sentence of conviction must consequently be affirmed.

Judgment affirmed.

^c6th ed. § 641. ^d*Ante*, last case. ^e*Post*, note to *Lamb's case*. ^f*Ante*, p. 484, note.

FRANKLIN v. THE STATE.

[29 ALA., 14.]

*Supreme Court of Alabama, June Term, 1856.*SAMUEL F. RICE *Chief Justice.*A. J. WALKER, }
GEO. W. STONE, } *Associate Justices.*

HOMICIDE—EVIDENCE OF CHARACTER OF DECEASED FOR VIOLENCE.

1. The character of the deceased for turbulence, violence, revengefulness, bloodshed and the like, where it qualifies, explains, and gives meaning and point to the conduct of the deceased, is proper evidence. [Acc. last case and references.]

2. The rule should not extend on the one hand, to excuse the taking of one's life because he is a bad man, nor, on the other, should it be limited to those cases where the facts are such as to make it *doubtful* whether the homicide was committed *as defendendo*.

3. When the conduct of the deceased is such that, *illustrated by his character*, its tendency is to excite a reasonable belief of imminent peril, the evidence ought to be admitted, and its effect left to the determination of the jury.

4. But the judge should determine in every case, as a preliminary question, whether the facts are such as will justify the admission of such evidence. But see the strong reasoning in Pridgen's case, *ante*, p. 416, where a contrary rule is held as to the admission of evidence of threats. Consult, also, on the same point, Robert Jackson's case, *ante*, p. 476.]

5. Where the prisoner and deceased were brothers, and the deceased came to the house where prisoner was, with a loaded gun, and used reproachful language, but no threats; and the prisoner complained that he was unarmed, and the deceased thereupon gave him his gun and walked away a few steps, and was in the act of sitting down, when the prisoner shot and killed him with the gun;—*it was held*, that evidence of the character of the deceased for violence was properly excluded.

6. Where it is proper to prove the character of the deceased for violence, this cannot be done by proof of isolated acts of violence. [Acc. Keener's case, *ante*, p. 547, and note; Com. v. Ferrigan, 44 Penn. State, 388. So, the character for chastity of the prosecutrix in an indictment for rape, may be impeached generally, but not by evidence of particular acts of unchastity. Rex. v. Clarke, 2 Stark. R., 243.]

Indictment against Philemon J. Franklin, for the murder of his brother, Christopher Franklin, by shooting him with a gun. The only evidence in relation to the killing, was the testimony of a young man, then about sixteen years of age, who was an eye-witness of it, and whose testimony, in substance, is stated in the opinion of the Court. On the part of the prisoner, evidence of his peaceable character was produced; and he then offered to prove, "that the deceased, some time before the killing, attempted to shoot a woman in Coffee county, without any cause." This evidence, on objection by the State, was excluded, and the prisoner excepted. The prisoner then offered to prove, "that the general character of the deceased, was that of a turbulent and dangerous man;" but this evidence also was excluded by the Court, and the prisoner excepted.

E. C. Bullock, for the prisoner; *M. A. Baldwin*, Attorney-General, for the State.

WALKER, J., delivered the opinion of the Court:

It has been twice decided in this State, and must now be regarded as law, that the testimony, in prosecutions for murder, may be such as will justify the admission of the bad character of the deceased as evidence for the accused. *Quesenberry v. The State*,^a 3 Stew. & Port., 308; *Pritchett v. The State*,^b 22 Ala., 39. In *Quesenberry's* case, this Court declined to decide in favor of the reception of such evidence, because the facts not being disclosed upon the record, it could not be perceived that the case presented an aspect justifying it. In *Pritchett's* case, the object of the Court seems to have been, to limit the admission of the evidence to cases where it may be considered a part of the *res gesta*. In both cases, it is carefully and properly denied, that the bad character of the deceased can, of itself, lessen the criminality of his murder. The rule is laid down in *Oliver's case*,^c 17 Ala., 599, that "the necessity which exculpates the accused from guilt, need not be actual; that

^a *Ante*, p. 549, note. ^b *Ante*, last case. ^c *Post*.

if the circumstances be such as to induce a reasonable belief that such necessity exists, the law will acquit the slayer of all guilt." It seems to result, as a sequence from this principle, that the character of the deceased for turbulence, violence, revengefulness, bloodshed and the like, where it qualifies, explains, and gives meaning and point to the conduct of the deceased, should be proper evidence. Conduct of a man of peaceable character, and harmless deportment, might pass by without exciting a reasonable apprehension of impending peril; while, on the other hand, the same conduct, from a man of notoriously opposite character and habits, might reasonably produce a consciousness of the most imminent peril, and a conviction of the necessity of prompt defensive action. Whenever such bad character on the part of the deceased, thus illustrates the circumstances attending a homicide, and the circumstances, *so illustrated*, tend to produce a reasonable belief of imminent danger in the mind of the slayer, the character, as mingled with the transaction, is a part of it, and is indispensable to its correct understanding. Such we understand to be, in effect, the decisions in Quesenberry's and Pritchett's cases.

To avoid detriment in the practical application of the rule, it must be understood neither, on the one hand, to excuse the taking of one's life because he is a bad man, nor, on the other, to be limited to those cases where the facts are such as to make it doubtful whether the homicide was committed *se defendendo*. The law cannot apportion the criminality of the homicide to the character of the deceased, and it cannot confine the rule to cases of doubt, because, in such cases, the defendant is entitled to an acquittal; and, therefore, so to limit it, would deny to it all practical effect. When the conduct of the deceased, although in itself innocent, is such that, illustrated by his character, its tendency is to excite a reasonable belief of imminent peril, the evidence ought to be admitted, and the question of its effect left to the determination of the jury. It would be for the Court to deter-

mine, in every case, whether the facts are such as will justify the admission of the evidence, as it is its duty to determine, before receiving in evidence the declarations of third persons, whether they are part of the *res gesta*.

We are of the opinion, also, that there are cases in which the character of the deceased might be looked to, in determining the amount of provocation, and thus fixing the degree of the homicide.

We cite below, the authorities which we have examined in reference to the questions above decided, some of which will be found to militate against our opinion, and to be less favorable to the accused. But the principles which we have laid down, have the fullest sanction of our judgment, because they are consistent with the previous decisions of this Court, and are, we think, founded in justice and reason. Wharton's American Criminal Law, 172; Roscoe's Criminal Evidence, 39; Wharton's American Law of Homicide, 249, 229; State v. Barfield,⁴ 8 Iredell's Law, 344, dissenting opinion of BATTLE, J.; State v. Thawley,⁴ Harr., (Del.,) 563; Wright v. The State,¹ 9 Yerger, 342; Dyson v. The State,² 26 Miss., 363.

We now turn to the testimony, for the purpose of enquiring whether the circumstances were such that, under the rule we have laid down, the character of the deceased, "as a turbulent and dangerous man," ought to have been admitted in evidence. The prisoner and the deceased were brothers, and worked together in a blacksmith shop. The deceased went to the prisoner's house with a loaded gun, late in the evening, and near the door of the prisoner's house, used reproachful and angry words for some time, but did not use any language of menace, or indicating an intention, either present or prospective, to perpetrate violence upon the prisoner. The deceased afterwards went into the house, where the prisoner was at the time lying upon a bed. Immediately afterwards, the prisoner said to the deceased, "You have come here with your arms, and I have nothing to defend myself."

⁴ *Ante*, p. 625. * *Post*, note to Lamb's case. ¹ *Ante*, p. 484, note. *Ante*, p. 304.

The deceased then placed his gun on the bed on which the prisoner was lying, and turned and walked off about ten feet to a table, and turned and sat down on the table, with his face to the prisoner. As the deceased turned to walk off from the bed, the prisoner seized the gun, cocked and presented it; and at the instant when the deceased sat down on the table, the gun fired, and the load entered the breast of the deceased, who fell forward, with his head towards the bed, and his feet three or four feet from the table, and expired in about half an hour. The evidence conduced to show that the deceased carried the gun for the purpose of shooting birds, and it does not appear that he had other arms. The deceased, upon the prisoner's suggestion of his defenceless condition, not only disarmed himself, but placed his gun in the power of the prisoner, and then walked away, with his back to his slayer; and at the instant when he was seating himself, he received the contents of his own gun, from the hand of him in whose power he appears to have placed it,—a token of trust, and a sign of his own peaceful intention. There was not a word spoken, not an act done, which, illustrated by the character of the deceased, and construed by the prisoner in the light of that character, could tend to produce a reasonable belief of imminent peril. Nor was there any act or word from the prisoner, which, explained by his character, could aggravate his conduct into such a provocation as to mitigate the offence to a lower degree.

The fact that the deceased had attempted to shoot a woman, was not admissible in evidence. If it had been a case in which the character of the deceased would have been competent evidence, it would not have been permissible to make out the bad character by isolated facts. *Nugent v. The State*,¹ 18 Ala., 521.

* * * * *

The judgment of the Court below must be affirmed, and its sentence executed.

Judgment affirmed.

¹ *Ante*, p. 547, note.

THE PEOPLE v. LAMB.

[41 NEW YORK, 360.]

*New York Court of Appeals, January, 1866.*HENRY E. DAVIES, *Chief Justice.*

WM. B. WRIGHT,	} <i>Judges.</i>
JOHN K. PORTER,	
WARD HUNT,	

WILLIAM H. LEONARD,	} <i>Justices of the Supreme Court, and ex-officio Justices of the Court of Appeals.</i>
RUFUS W. PROCKHAM,	
LEROY MORGAN	
JAMES E. SMITH,	

[The report does not show what Judges and Justices were present, except DAVIES, Chief Judge, and SMITH and MORGAN, Justices.]

ACTING UPON APPEARANCES OF DANGER—CHARACTER OF DECEASED FOR VIOLENCE—PRESUMPTION OF MALICE.

Per DAVIES, Ch. J.:

1. No apprehension of danger previously entertained, will justify the commission of homicide; it must be an apprehension existing *at the time* the prisoner struck the blow. [Acc. Harrison's case, *ante*, p. 71; Scott's case, *ante*, p. 163; Rippy's case, *ante*, p. 345; Dyson's case, *ante*, p. 304; Lander's case, *ante*, p. 366; Williams' case, *ante*, p. 349; and many others. Contra, Philips' case, *ante*, p. 383; Carico's case, *ante*, p. 389; Bohannon's case, *ante*, p. 395.]

2. In trials for homicide, the character of the person slain cannot in general be drawn in question; for equality before the law, is a maxim of universal justice, and the life of the humblest and most abandoned is equally entitled to the protection of the law as that of the most cultivated, refined or elevated. [See Pritchett's case, *ante*, p. 636, and the references there collected.]

3. Evidence of the violent character of the deceased can only be admitted, where the evidence shows that there was an assault committed or threatened by the deceased upon the prisoner, and where a doubt is created whether the homicide was committed from malice, or to repel such assault, and from a principle of self-defence.

4. The evidence in this case set out at length, and *held* that no such question could arise thereon.

5. Before evidence of the violent character of the party slain can be admitted, it must be shown that an assault was committed or threatened by the person slain at the time of the homicide, or so immediately preceding it, or so intimately connected with it, as to justify the taking of life in self-defence, or to ward off great, impending and imminent danger of bodily harm.

6. Before proof of the violent character of the deceased can be admitted in any case, it must be made to appear that the defendant knew of such character, and although a husband may be presumed to know the character of his wife, yet it seems that in such a case, such knowledge ought to be affirmatively proven.

7. It is not error to tell the jury that the law presumes malice from the mere act of killing. [See *Stokes' case*, *post.*]

Per SMITH, J.:

8. To maintain that a killing was justifiable on the ground of self-defence, it is necessary to show: (1) that the defendant himself was acting in no wise against law in the encounter which resulted in the homicide; (2) that at the time of giving the fatal blow, he had reasonable ground to apprehend a design to do him some great personal injury; and (3) that there was imminent danger of such design being accomplished.

9. The right of attack for the purpose of defence, does not arise until the party claiming such right, has done everything in his power to avoid its necessity. [Acc. *Sullivan's case*, *ante*, p. 65; *Shippey's case*, *ante*, p. 136. Contra, under certain circumstances, *Bohannon's case*, *ante*, p. 395.]

Per DAVIES, Ch. J., and SMITH and MORGAN, JJ.:

10. The Judge charged the jury as follows: "A man is not bound, if his life is in imminent peril or danger, to wait until he receives a fatal wound, or has some great bodily injury inflicted on him. If he think his life is in imminent peril, he has a right to act upon that thought and take life; but if he does it, it is at the risk of a jury saying, when all the facts are developed before them, whether he was justified in forming that opinion or not. If you are satisfied from the evidence, that the circumstances did not warrant the conclusion that he arrived at, and that he took life, it is no justification, and you have a right to convict. It is not his impressions alone, but the question is, whether those impressions at the time he formed them, were correct. If they were correct, it is a protection; if they were incorrect, then it affords him no immunity or protection." This charge was, in the opinion of DAVIES, Ch. J., SMITH, J., and MORGAN, J., not erroneous, when taken as a whole; and SMITH, J., and MORGAN, J., were of opinion that there were no facts proved to which a charge on the law of self-defence was applicable, and hence that it was not, if erroneous, calculated to prejudice the defendant. [See note w., *infra*.]

A. Oakey Hall, for the plaintiffs in error; *Wm. F. Kintzing* and *A. S. Cohen*, for the defendant in error.

DAVIES, Ch. J.: The prisoner was indicted and convicted in the New York General Sessions, for the mur-

der of his wife, Joanna Lamb. The prisoner and his wife occupied a room in Oak street, in that city, and, at the time of the homicide, there were present in the room, the prisoner and his wife, Ann Kennedy, Mary Riley, Bridget Curtis, and a little girl named Joanna Clifford, who was the daughter of the deceased by a former husband, and then aged about eight years. The prisoner and his wife, according to the testimony of Kennedy, came together into the room about six or seven o'clock in the evening. The first thing the witness observed, was the prisoner, applying a vile epithet to the deceased, and then made at her with his fist. The prisoner was prevented from assaulting his wife by the witness and another woman, or, rather, the assault intended for her, was inflicted upon the witness. The prisoner then took a stick, and attempted to hit his wife, but was prevented by the woman, Riley. He then struck the deceased with his fist. Saw the prisoner have a knife in his hands. This witness then left the room to procure some water for the deceased, which she said she wanted, and, on her return, she met the prisoner going out; he passed her. She found the deceased in the room, all covered with blood. Mary Riley, the little girl, and Bridget Curtis, were then in the room with deceased. She testified, that at this time the deceased made no attempt to strike the prisoner. She identified the knife as that of the prisoner, and there was no question made but that the prisoner inflicted the fatal wound, of which the deceased died. Mary Riley testified, that the deceased came in about two minutes before the prisoner, and her statement of what occurred up to the time Ann Kennedy left the room, was similar to that made by her. The prisoner, according to the witness' statements, got his two hands on her chest, and pitched her over against the bed, and she fell between the bed and the stove. When she arose, the deceased was bleeding, and the witness said to the prisoner: "You murderer, you have killed your wife." He made no reply, but stooped down, tied his shoes, and walked out. She also testified, that the

deceased did not go near the prisoner at all, but he ran at her. On this night, she never saw the deceased raise hand or foot against the prisoner.

Bridget Curtis, the other person present in the room, as testified to by the other witnesses, was in bed, and, she says, asleep; that the noise of the tussle awoke her. When she awoke, the deceased was bleeding, lying on the floor. The prisoner was then in the room, but did not remain, but went out.

Joanna Clifford, the other person present, testified to the same facts as the other witness, as to the conduct of the prisoner, and his assault of the deceased; and added, that after he had knocked Mrs. Riley down, he came alongside of the deceased and stabbed her in the neck with a black-handled penknife; he stabbed her once; the witness was sitting on her lap at the time he stabbed the deceased.

For the defence, Mary Driscoll was called, who testified, that she was in this room on the evening of the homicide, and that the prisoner went out, and, as he went out, the deceased flung the lid of an iron kettle after him at the door, and he came back and made a blow at her with his hand. She afterward testified, that at the time she threw the lid at him, he went out and came back in fifteen minutes, and sat on the chair. The little girl, Joanna Clifford, testified, that she went for officer O'Day, and he testified, that when he went to the premises, he found Ann Kennedy, Mrs. Riley, and Bridget Curtis there; and the little girl was there. He also testified, that he did not see Mary Driscoll there; and Ann Kennedy and Mary Riley both swore, that Mary Driscoll was not there that evening, and the same inference may be drawn from the testimony of Bridget Curtis and the little girl, Joanna. I think the jury might have been warranted in finding that Mary Driscoll was not present at the time of the homicide; and, even if she was, that her testimony, as to any provocation having been offered by the deceased, or any assault made upon the prisoner by her, or any attempted or threatened,

were wholly unsupported by any evidence, or any corroborating circumstance. The jury might well say, there was not a scintilla of evidence to sustain the theory of the prisoner's defence, namely, that when the prisoner struck the blow which caused her death, he had a reasonable ground to apprehend a design on the part of his wife to do him some great personal injury or bodily harm, and that, therefore, he believed there was imminent danger of such design being accomplished.

I cannot discover, from a very careful examination of the testimony in this case, any ground upon which such a theory can rest. Assuming, for the sake of the argument, that Mary Driscoll was present at the time of the occurrence, and that her statement of what transpired is to be credited, then this defence is equally baseless. For, according to her statement, the only ground he had to apprehend a design on the part of his wife to do him some great personal injury or bodily harm, and from which he could believe there was imminent danger of such design being accomplished, was the circumstance that, as he was leaving the room in which the deceased was, she threw the lid of an iron kettle after him at the door. Now, there was no evidence that he knew or saw this thing thrown after him, but the strong inference is, that he knew nothing about it. He was going out of the room, and it was flung after him at the door, that is, as I understand it, as he was passing out of the door. There is no evidence that it attracted his attention in any way, or that it hit him, or came near hitting him. It was not a weapon in the hands of a woman thus thrown, of a very deadly character, or if he had seen it, or known of its being thrown, much calculated to excite an apprehension in his mind that his wife intended to do him some great personal injury or bodily harm. As it does not appear that he knew anything about it, it is an obvious and natural inference that no such apprehension was excited, or had any existence. Again, this occurrence was at least, according to Mary Driscoll's statement. fifteen minutes before the altercation

arose in which he inflicted the fatal wound upon the deceased. During that period, he had sufficient time to cool ; and, as no renewed attempt was made, either by threats or acts, to inflict any injury upon him, it is not seen how this circumstance can be invoked to aid the prisoner in establishing the existence of any such apprehension at the time of the homicide. It cannot be contended that any previous apprehension can afford any justification. It must be an apprehension existing *at the time* the prisoner struck the blow.

It becomes now necessary to examine the particular evidence offered by the counsel for the prisoner and excluded. The prisoner called a witness not present at the time of the homicide, to speak of the general character of the deceased. Good character on the part of the prisoner has always been admitted, as it tends, when established, strongly to show that the accused could not have been guilty of the crime charged ; and when the testimony is doubtful and uncertain in its nature, such good character is a leading element in establishing the innocence of the party accused. But it is certainly novel in the administration of criminal justice, that the general bad character of the person slain can either tend to show that the party charged is not guilty of the homicide, or in any sense mitigate the crime of taking human life. Equality before the law, is a maxim of universal justice ; and the life of the humblest and the most abandoned is equally entitled to the protection of the law, as that of the most cultivated, refined, or elevated. It is not for man to say which may be taken and which spared.

The defendant's counsel put these questions : Do you know the general character of Mrs. Lamb ; that is, whether she was of a fighting, vindictive, brutal nature or not ? Was Mrs. Lamb of a quarrelsome, vindictive, and brutal character ? What was her general character for peace and quietness ?

These three questions were severally objected to by the counsel for the people, and the objections sustained, and

the counsel for the prisoner excepted, and these exceptions present the only questions arising upon the evidence. It is conceded, that such evidence can only be proper in a case, where the evidence shows that there was an assault committed or threatened by the deceased upon the prisoner, and a doubt was created whether the homicide was perpetrated from malice or to repel such assault, and from a principle of self-defence. Now, it has been shown, and it is submitted conclusively, that no such question legitimately arose upon the evidence in this case. The deceased was not shown to have committed any assault upon the prisoner, nor did she threaten to commit any. There was no foundation, therefore, for the position that the prisoner committed the homicide in self-defence, or from any apprehension of great or any bodily harm.

The testimony could, therefore, have been properly excluded on the ground of its irrelevancy, and I cannot see that it was admissible upon any principle, upon the facts proven in this trial. The defence set up must be such as the facts developed will sustain, and if no assault upon the prisoner has been committed or threatened, then the defendant's counsel concedes the evidence of character of the deceased is inadmissible. It must be an assault committed or threatened at the time of the homicide, or so immediately preceding it, or so intimately connected with it, as to justify the taking of life in self-defence, or to ward off great, impending and imminent danger of bodily harm. It is unnecessary to recapitulate the evidence to show that no such state of circumstances existed here. That these views are abundantly sustained by text-writers and authority, a reference to some of them will satisfactorily appear. Wharton, in his *American Criminal Law*, §641, thus lays down the doctrine: "On the trial of an indictment for homicide, evidence to prove that the deceased was well known, and understood generally by the accused and others, to be a quarrelsome, riotous and savage man, is inadmissible. In the eye of the law, to murder the vilest and most abject

of the human race, is as great a crime as to murder its greatest benefactor. In one or two cases, however, while the law as above laid down was distinctly recognized, it has been said, that where the killing has been under such circumstances as to create a doubt as to the character of the offence committed, the general character of the deceased may sometimes be drawn in evidence, but the rule undoubtedly is, that the character of the deceased can never be made a matter of controversy, except when involved in the *res gestæ*; for it would be a barbarous thing to allow A. to give as a reason for killing B., that B.'s disposition was savage and riotous." And Wharton, in his American Law, of Homicide, p. 249, says: "It has already been briefly considered, how far the character of the deceased for peace and order may be drawn into question, where the defence taken is, that the defendant, from all the circumstances in the case, of which the deceased's character was one, had reason to be in fear of his life. As was then shown, there have been cases in which courts have been obliged to allow such evidence to be introduced, and it is easy to imagine cases in the future in which it would be impossible to exclude it; but, as a general principle, the rule continues unbroken, that evidence that the deceased was riotous, quarrelsome and savage, is inadmissible, even though such knowledge be brought home to the defendant himself; any other rule would allow a private citizen to take upon himself the province of government in the punishment of crime." Thus it is seen, that, as a general principle, such evidence is inadmissible. When admissible, it must be in a case where the defendant had reason to be in fear of his life, or had reasonable ground to apprehend great bodily harm.

Neither of these essential prerequisites appeared in this case. Again, it is fundamental to the admission of this class of testimony, in a proper case, that knowledge of the character of the deceased must be brought home to the knowledge of the defendant himself. It might be presumed that a man would know the character of his

wife in this respect. Yet, I think this would not dispense with the rule, that it should affirmatively appear that the defendant had such knowledge, before a foundation can be laid for the introduction of this testimony.

The authorities cited to maintain these propositions are: *Quesenberry v. State*,^a 3 Stew. & Port., 315; *Tackett v. State*,^b 1 Hawks, 210; *White v. State*,^c 9 Yerg., 342; *State v. Jackson*,^d 17 Mo., 544; *State v. Tilly*,^e 3 Ired., 424; *State v. Field*,^f 14 Maine, 248; *Com. v. York*,^g 9 Metc., 110; *State v. Thawley*,^h 4 Harr., 562; *Com. v. Hiliard*,ⁱ 1 Gray, 294; *Oliver v. State*,^j 17 Ala., 587; *Com. v. Seibert*,^k Whart. L. H., pp. 227-228. To which others may be added: *Monroe v. State*,^l 5 Ga., 85; *Pritchett v. State*,^m 22 Ala., 39; *Franklin v. State*,ⁿ 29 Ala., 14; *Dukes v. State*,^o 11 Ind., 557; *State v. Hicks*,^p 27 Mo., 588; *State v. Barfield*,^q 8 Ired., 344.

[The learned Judge here reviewed most of these cases at length. As we print them fully elsewhere, we omit this part of the opinion. He proceeded:]

"I think these cases abundantly and satisfactorily show that the ruling upon the trial in this case, excluding the testimony offered, was correct. Indeed, I have not met with a case where such evidence was offered and insisted on, when it did not distinctly appear that the deceased had assaulted the prisoner, and when that fact thus appeared, then the evidence is admitted upon the principle that it tends to rebut the presumption of malice, or, that the killing was in self-defence, or under the reasonable apprehension of great bodily harm. But, on the facts proven in this case, the principle contended for has no application."

^a *Ante*, p. 549, note. ^b *Ante*, p. 615. ^c *Ante*, p. 484, note. ^d *Note, sub fin.* ^e *Note, sub fin.* ^f *Ante*, p. 629. ^g *Note, sub fin.* ^h *Note, sub fin.* ⁱ *Note, sub fin.* ^j *Post.* ^k *Note, sub fin.* ^l *Ante*, p. 467. ^m *Ante*, p. 635. ⁿ *Ante*, last case. ^o *Ante*, p. 571. ^p *Note, sub fin.* ^q *Ante*, p. 618.

^r From the report of the principal case in the Supreme Court, whence it was taken to the Court of Appeals, (54 Barb., 349), it appears that SURBERLAND, J., dissenting from the general conclusion of the Court, said:

There was no error in the statement of the Judge to the jury, that the law presumes malice from the mere act of killing; because the natural and probable consequences of any deliberate act are presumed to have been intended by the author. The Judge had just read the statutory definition of murder; and the law implies malice when the killing is premeditated or deliberate. The

"I think the evidence as to general character, and as to character, was properly excluded, for the simple reason, that, if the evidence had been received, it would not have justified, nor tended to justify, the commission of the alleged act or crime for which the prisoner was being tried. When this evidence was offered, there was no evidence tending to show that the deceased, on the occasion when she lost her life, assaulted the prisoner; on the contrary, the evidence which had been given on the part of the people tended to show, conclusively, that she did not, on that occasion, assault him, but that he did assault her first with a stick and his hands, and then with a knife.

"The case of *Reynolds v. the People*, 17 Abb., 413, could not properly be referred to as an authority to show that the evidence as to the character of the deceased in this case, should have been received; for, in the first place, the Court did not decide, or intend to decide, in that case, that the evidence to show that Mathews, the deceased, was a dangerous, violent and quarrelsome man, would have been admissible, had it appeared that the prisoner was acquainted with him or his character. In the opinion it was remarked that, perhaps, if this had appeared, the evidence would have been admissible; but the Court had no occasion to decide whether it would or would not, and certainly the Court would not have held it to have been admissible, under any circumstances, without further examination. Again, the offer, in the case of *Reynolds*, was to show that he was a dangerous, violent and quarrelsome man, and the offer was made under very different circumstances. My recollection is, that the affray in which Mathews lost his life, took place suddenly on a public highway, after dark, and that, when the offer was made, the evidence tended to show that Mathews and his party were the attacking party. [See this case in note, *sub fin*].

"Moreover, the formal ruling of the city judge, on the question of evidence as to the character of the deceased in the principal case, could not have prejudiced the prisoner; for he was permitted to prove, and did prove, that his wife was a woman of great muscular strength, and had been in the habit of quarreling with him, and, upon several occasions, had struck him. Indeed, I think it may be said that the district attorney frequently objected as to the character of the deceased as a quarrelsome, brutal woman, yet that her character was, in fact, as fully proved as though he had made no such objection. It is not probable, that the prisoner would have produced any other or further evidence as to his wife's character than was given, even if his offers of proof, as to character, had not been formally overruled."

jury could not have been misled by this remark of the Judge.*

It is claimed, also, on behalf of the prisoner, that the Court erred in its charge when he said to the jury: "It is not his impressions alone, but the question is, whether those impressions, at the time he formed them, were correct. If they were correct, it is a protection; if they were incorrect, then it affords him no immunity or protection." It is well to see in what connection this language was used. The Judge, immediately preceding, and in this connection, had said: "The other principle of the law is, that a man is not bound, if his life is in imminent peril or danger, to await until he receives a fatal wound, or has some great bodily injury inflicted on him. If he thinks his life is in imminent peril, he has a right to act upon that thought and take life; but, if he does it, gentlemen, it is at the risk of a jury saying, when all the facts were developed before them, whether he was justified in forming that opinion or not. If you are satisfied, from the evidence, that the circumstances did not warrant the conclusion he arrived at, and that he took life, it is no justification, and you have a right to convict" Then follow the sentences objected to, already quoted. It is seen, on an examination of them,

* Upon this point, SUTHERLAND, J., (dissenting) in the Supreme Court, said:

"The exception to the remark of the city judge in his charge, that the law presumes malice from the mere act of killing, etc., is evidently founded on a misconception of the city judge in making the remark. He did not intend that the jury should understand from the remark, that in this case, after all the proofs were in, the law presumed malice from the mere act of killing. Looking at the remark in connection with what he had said previously, and with what he said immediately after, it is evident that the jury could not have been misled by the remark. In making the remark, he stated a mere abstract principle of common law, and his object in stating it was to show the jury that it was a question for them, under the evidence in the case, whether the legal presumption from the mere act of killing, had been removed by the evidence in the case.

"The question whether the act of killing, which the prisoner confessedly did commit, was, under the evidence, murder in the first or second degree or manslaughter, or excusable or justifiable homicide, I think, was fairly submitted to the jury."

that they are only an amplification or illustration of the previous remarks. He had already told them that his justification did not consist in the fact, that he came to the conclusion that his life was in danger, but that the jury must be satisfied that he was justified in forming that conclusion from the facts before him. And he, therefore, in further illustration, told them that impressions alone were not a justification, but those impressions must have facts for their basis ; such facts as would warrant or authorize him in forming or entertaining these impressions ; in other words, the impressions must be correct. If the impressions *alone* of a criminal, that his life was in danger, when such impressions are not reasonable, and have no facts for a foundation, are an immunity for taking life, it is not difficult to see that every prisoner will have such an impression ; if that *alone* is an immunity, it will be easy in all cases to be availed of.

This portion of the charge is in conformity with the rules as laid down by BRONSON, J., in this Court, in the case of *Shorter v. The People*,¹ 2 Comst., 193.

[Here the learned Judge stated the facts of *Shorter's* case, and quoted the language of BRONSON, J., at considerable length, and then proceeded:]

In the view of the facts proven on the trial of this case, the charge of the Judge was far more favorable to the prisoner, than the doctrine enunciated by this Court in *Shorter's* case would warrant. Here, the Judge told the jury that the impressions alone were not sufficient. In *Shorter's* case, we said it was not enough that the party even believed he was in danger. His justification must turn upon this: Were the facts and circumstances such, that the jury could say he had reasonable grounds for his belief? He must decide, at his peril, upon the force of the circumstances, in which he is placed, for his decision must be subject to judicial review. The Judge, therefore, committed no error in this portion of his charge, and if the portion of the charge now criticized

¹ *Ante*, p. 256.

was subject to exception, every thing objectionable in it was removed by the Judge charging, as requested in the third proposition of defendant's counsel. He certainly, then, explained what he understood by the language used."

"Upon this point, INGRAHAM, Presiding Justice, when this cause was passed upon by the Supreme Court, said :

"When the evidence is offered to show that the prisoner killed the deceased in self-defence, and that he feared the deceased intended to attack him, the rule is, that the prisoner must have had reasonable ground for believing the deceased intended to take his life or to do him bodily harm, and that there was reasonable ground for supposing the danger imminent that such design would be accomplished, although it should afterwards appear that no such design existed; that there was no real danger of its being perpetrated. See the various authorities in *Pfomer v. People*, 4 Park C. R., 558. [These authorities are all included in the present volume. They will be found only in the brief for the plaintiff in error in *Pfomer's* case.—Eds.]

"The city judge charged, 'If he thinks his life in imminent peril, he has a right to act upon that thought, and take life; but if he does it, it is at the risk of a jury saying, when all the facts are developed before them, whether he was justified in forming that opinion or not. If you are satisfied from the evidence that the circumstances did not warrant the conclusion that he arrived at, it is no justification, and you have a right to convict. It is not his impressions alone, but the question is whether those impressions were correct. If they were correct, it is a protection. If they were incorrect, then it affords him no immunity or protection.' 'As I understand the rule, it is not material whether the impressions were correct or not; but the true enquiry is, whether the prisoner had reasonable grounds to suppose he was in danger; and, if such grounds existed, whether the danger was imminent, or whether he could have avoided the danger by departing. It did not permit a jury to convict if they should find he was not justified in forming such an opinion; nor if they were satisfied that the circumstances did not warrant the conclusion; nor, if the impressions which the prisoner had formed were incorrect. Their attention should have been directed to the enquiry whether the prisoner had any reasonable grounds for forming such an opinion. If he had, then, whether the prisoner was justified in forming such an opinion, and whether the impressions formed were correct, would be immaterial.

"I cannot avoid the conclusion, that the latter part of these instructions may have led the jury to suppose, if the opinion or impressions formed by the prisoner were wrong, and that he was *not in reality* in danger of some great bodily injury, that his impressions would afford him no protection. The question of justification in forming such an opinion, is not properly for the jury; but the true question is, whether there was reasonable grounds for thinking so; whether the conclusion was true or not. If he had no reasonable grounds for forming such an opinion, he was not protected; but if he had such reasonable grounds, then, although such impressions were incorrect, he was excused.

Notwithstanding my opinion, that no injustice has been done to the prisoner by any of the rulings upon his trial, or any proceedings therein, I nevertheless concur with my brethren, that, under the peculiar circum-

"It is true that subsequently, when requested to charge in the words of the statute, that if the jury believed that when the prisoner struck the blow, he had a reasonable ground to apprehend a design to do him some bodily harm, etc., then he was justified in striking the blow, and it was their duty to acquit, he replied, 'I have already charged in that way.' Such a remark, however, can hardly be said to be an instruction to the jury. It is rather an answer to counsel, to a request made of the Court, and cannot be considered sufficient to remove the impression which the previous remark made directly to the jury, must have made.

"I think the judgment should be reversed, and a new trial ordered."
LEONARD, J., concurred.

Upon the same point, SUTHERLAND, J., (dissenting) said:

"Upon the theory that the jury might come to the conclusion that Mary Driscoll, one of the prisoner's witnesses, in stating that the deceased struck the prisoner with a poker before he gave her the fatal blow, testified to the truth, the city judge charged the jury, in substance, that it was for them to say whether the prisoner was justified in believing or forming the opinion that his life was in danger; that the question was not as to what his impressions were in fact, as to his life being in danger; but whether the evidence showed that he was justified in having such impressions—whether the impressions were correct. Now, though I think it must be conceded that the distinction between what the prisoner thought, and what he was justified in thinking, was impracticable and useless; for how could the jury find from the evidence that the prisoner thought his life to be in danger, without finding that he was justified in thinking his life to be in danger?—yet, I think, the jury must have understood the whole charge on this point to be, in substance, that if they believed Mary Driscoll, it was for them to say, under the evidence, whether the prisoner was justified in thinking that it was necessary to take the life of his wife to protect his own, or to protect himself from great bodily injury."

The proper manner of instructing juries, with regard to this branch of the law of self-defence, is ably discussed in the case of *The State v. Chandler*, 5 La., An., 489, determined in the Supreme Court of Louisiana, in 1850, before EUSTIS, Ch. J., and ROST, SLIDELL, and PRESTON, JJ.

PRESTON, J., delivered the opinion of the Court: * * * "The counsel of the accused requested the Court to charge the jury, that, 'when, from the nature of the attack, there is reasonable ground to believe there is a design to destroy his life, or commit any felony upon his person, the killing of the assailant will be justifiable homicide, although it should afterwards appear that no felony was intended.' The Court refused to charge the jury as requested, and declared that the charge so requested was not law.

"This was the charge given to the jury by Chief Justice PARKER, in the celebrated trial of Selfridge, [*Ants*, pp. 17-18.] It is strictly the law of self-defence laid down by Russell, McNally, and other elementary writers,

stances of this case, and in view of the provisions of the special statute, applicable to appeals in capital cases tried in the New York General Sessions, (Laws of 1855, p. 613, § 3), the prisoner should have another trial.

and decided in many cases. East, in his Pleas of the Crown, lays down the principle in these words: 'A man may repel force by force in the defence of his person, habitation or property, against one who manifestly intends or endeavors, by violence or surprise, to commit a known felony, such as murder, rape, robbery, arson or the like, upon either. In these cases, he is not obliged to retreat, but may pursue his adversary, until he has secured himself from all danger, and, if he kill him in so doing, it is called justifiable self-defence.' [1 East, P. C., 272.] He qualifies the principle substantially, as Chief Justice PARKER did, that there must be actual danger at the time from violence, and a reasonable belief that a felony is intended.

"If there be an actual physical attack of such a nature as to afford reasonable ground to believe that the design is to destroy life, or to commit a felony upon the person assaulted, the killing of the assailant in such case will be justifiable homicide in self-defence. We are of opinion, therefore, that the charge asked in this case, and as given by Chief Justice PARKER in the case of Selfridge, is the law of self-defence.

"There has not been much doubt as to the correctness of the principle, as to its applicability to the state of facts established in Selfridge's case; and, therefore, the great effort of judges, in trials for homicide, should be clearly to point out to juries the state of facts to which the principle is applicable, and that state of facts to which it is inapplicable; and, in a case to which the principle is clearly inapplicable, to decline giving it in charge to the jury at all, and for that reason alone.

"To express our views in relation to the present case: If Daily actually attacked Chandler, and was beating his head against a brick wall, so as to put his life really in danger, and Chandler then killed his assailant from absolute necessity to preserve his own life, the charge asked for was not only the law of self-defence, but was applicable to the case, and should have been given to the jury by the Court. But if Daily was unarmed and sick, and only in consequence of a quarrel with Chandler's wife, the preceding evening, the latter was so enraged that he rushed upon and gave him four stabs with a bowie-knife, until then concealed in his bosom—Daily being a perfectly passive victim—the charge asked was entirely inapplicable, and should have been refused by the Judge on account of its irrelevancy to the case.

"We have no means of knowing what was the true state of facts proved in the case, so as to judge whether the charge asked was necessary and relevant to the case, or only an abstract legal opinion. If the testimony given in the defence afforded a reasonable ground for asking the charge, the Court erred in not giving it. If the state of facts proved was such as to render the charge entirely inapplicable to the case, the Court should have refused it on that ground alone. 1 Cranch, 309, 318. Even if the charge asked was an abstract principle of law, not applicable to the facts of the case, the

SMITH, J.: The testimony in this case, carefully considered, does not, in any view, warrant the defendant's assumption that the killing of his wife was justifiable as a lawful and necessary act of self-defence. To maintain such claim, it was essential to show: First, that the defendant himself was acting in nowise against law, in the encounter which resulted in the homicide; second, that at the time of giving the fatal blow, he had reasonable ground to apprehend a design to do him some great personal injury; and, third, that he also had reasonable ground to believe that there was imminent danger of such design being accomplished. 2 R. S., 680, § 3, sub. 2; *The People v. Shorter*,^v 2 Comst., 193; *The People v. Sullivan*,^v 3 Seld., 396.

The defence failed in each of these particulars. According to the testimony of Mary Driscoll, the only witness relied upon by the defendant to prove his plea of self-defence, the defendant was the aggressor in the final encounter, which terminated in the homicide. His wife had previously hit him on the hands with a poker, and had flung the lid of an iron kettle after him at the door. He stood near the door about fifteen minutes after the missile was thrown, and then advanced upon his wife and struck her with his fist. Soon afterward, she pulled his chair from under him, and he then knocked her down with a stick of wood, and, she getting up, they had a scuffle, in which he inflicted the wound of which she died. The deceased had no weapon after she discharged the iron lid, and there were no facts or appearances, justifying the belief that she designed to do him a great personal injury, and that the danger of the ac-

Court having erroneously stated to the jury that the principle was not law, they may have been misled by the error, and the better opinion is that the verdict should be avoided. *Etting v. The Bank of the United States*, 11 Wheaton, 59.

"The judgment of the District Court is reversed, and the case remanded for further proceedings, with directions to put the prisoner on trial for manslaughter alone, he having been substantially acquitted of murder, and with directions to the Court, in its charge to the jury, to conform to the principles contained in our opinion." The judgment was reversed.

^v *Ante*, p. 256. ^v *Ante*, p. 65.

accomplishment of such design was imminent. If he believed she designed to attack him and do him such injury, he had ample opportunity to avoid the attack, and it was his duty to do so. His right of attack, for the purpose of defence, did not arise until he had done everything in his power to avoid its necessity. *People v. Sullivan, supra.*

The instruction given by the Judge to the jury, on the subject of justifiable homicide, was, therefore, an abstract proposition; and, even if it was erroneous, it did not prejudice the defendant.

But, viewing the portion of the charge relating to that subject, as a whole, and not in detached fragments, it is by no means clear that it was erroneous. The Judge said: "A man is not bound, if his life is in imminent peril, to wait till he receives some great bodily injury. If he thinks his life is in imminent peril, he has a right to act upon that thought, and take life; but, if he does it, it is at the risk of the jury saying, when all the facts are developed before them, whether he was justified in forming that opinion or not. If the jury are satisfied, from the evidence, that the circumstances did not warrant the conclusion that he arrived at, and that he took life, it is no justification, and they have a right to convict." Thus far, the charge was quite unexceptionable. The Judge said, further (and this is what is excepted to): "It is not his impressions alone, but the question is, whether those impressions, at the time he formed them, were correct. If correct, they are a protection; otherwise, not." By fair construction, the term "correct impressions," thus used, is to be read in the light of the preceding portion of the charge above cited, and it means simply, "impressions warranted by the circumstances" under which the defendant acted at the time of the homicide. It would be putting a forced and narrow construction upon the charge to say, that it was intended by the Court, or understood by the jury, to exclude impressions based upon appearances, which were afterward shown to be false.

The fact that there was no evidence in support of the plea that the homicide was justifiable, was also a sufficient ground for rejecting the offer of the defendant's counsel, to show that the deceased was of a quarrelsome, vindictive and brutal disposition. The authorities cited by the defendant's counsel, show that testimony of that nature has been received only in cases where the killing took place under circumstances that afforded the slayer, reasonable grounds to believe himself in peril, and then solely for the purpose of illustrating to the jury the motive which actuated him. Whart. Am. Crim. Law, § 641, 4th ed.; Whart. on Homicide, p. 249, and cases there cited.

When the offer was made in the case, the witness, Driscoll, had not been examined, and after her testimony was given, the offer was not renewed.

Besides, testimony substantially of the character of that offered, was allowed to come in, inadvertently or otherwise, in the course of the trial, so that the defendant was not prejudiced by the rejection of the offer.

* * * * *

Under the provisions of the special statute, which gives us a peculiar jurisdiction in this case, (Laws 1855, p. 613, ch. 537, § 3,) I think the defendant is entitled to a new trial.

I am, therefore, of opinion that the judgment of the Supreme Court, setting aside the conviction and ordering a new trial, should be affirmed, and that the record, with the judgment of this court, should be remitted to the Court of General Sessions of the city and county of New York, to proceed therein.

MORGAN, J.: There was evidence, if the jury believed the little girl, to convict the prisoner of murder in the first degree. If he deliberated and declared his intention to kill his wife, and followed it up with a fatal blow, he was guilty of murder in the first degree, according to all the authorities. The prisoner had a fair trial, so far as the evidence is concerned, and the charge of the judge was in the main unexceptionable. The objection as to

what he said in relation to the impressions of the prisoner as to whether he or the jury was to estimate the magnitude of the danger which would justify him in killing his wife in self-defence, was quite foreign to the case in hand, for there was really no evidence, which would have authorized the jury to find that the prisoner committed the act in self-defence. But I will observe that if the case was one where a question could fairly arise, the jury are to judge whether the prisoner was in such apparent danger as to cause him to believe it was necessary to kill his adversary in self-defence. It is not enough for the prisoner to say he believed it; he is not even a witness for any such purpose; but it is for the jury to determine whether or not the prisoner had a right to believe it. This belief may be founded only upon appearances, where there is no real foundation for such an apprehension. Although the judge seemed to have been unfortunate in selecting the proper expressions to define the rule of law in this respect, I think his charge is not liable to be misinterpreted by the jury to the prejudice of the prisoner. Indeed, I cannot, as I have already observed, see any evidence upon which such a question could fairly arise.* And as such a question could not

*The words of the charge to which objection was made, namely, "It is not his impressions alone, but the question is, whether those impressions, at the time he formed them, were correct; if they were correct, it was a protection; if they were incorrect, then it affords him no immunity or protection,"—standing alone, convey a proposition of law clearly erroneous, and at variance with all the authorities. For the words quoted, can manifestly have no other meaning than that the slayer will not be excused, if he act upon the appearance of danger, unless the danger is actual. This doctrine, it is believed, has been abandoned by every American court. It would go as far towards one extreme as *Grainger's case*, *ante*, p. 238, goes towards the other; for this last case is commonly understood as deciding that a man's honest impressions of danger, although those impressions are not based upon reasonable grounds, but spring from fear, alarm or cowardice, will protect him in killing his assailant—a doctrine which is equally without sanction. It may well be doubted, whether the respectable Judge, who tried this case at *nisi prius*, may not have been, at most, guilty of a slip of the tongue or pen, in charging in this language; but of the import of the words themselves when taken alone, there would seem to be no doubt. Nor is it clear, that the attempt of the learned Judges to clear the words of their objectionable

arise upon any theory of the evidence, it was not material to go back and enquire what had been the character of Mrs. Lamb, except so far as to show that she was quarrelsome and abusive toward her husband on this particular occasion. The judge was sufficiently liberal toward the prisoner in the reception of this species of evidence.

* * * * *

A majority of the court affirm, but upon different grounds.

Judgment granting new trial affirmed.

meaning, by reference to the sentences of the charge immediately preceding, has been successful. On the contrary, it seems clear to us, that the words objected to, must be interpreted as explanatory of the sentences preceding; and that they hence, must have a controlling effect over the meaning of the whole. And this is the effect which they would probably have upon the minds of the jury. For by attending to our mental operations a moment, it will be manifest that the last words of explanation always impress us as being of the greatest importance, and remain in our memory the longest. Besides, it often happens, that a person at first does not make himself clearly understood, or does not express what he wishes to say in a manner satisfactory to himself; but goes on with various qualifications and emendations, until he arrives at expressions satisfactory to himself, or makes himself clearly understood; in which case, the latter words of the discourse, control the meaning and supersede, in the hearer's mind, the former. For these reasons, the words above quoted seem to us, notwithstanding the preceding parts of the charge, clearly calculated to create an erroneous impression on the minds of the jury, of the law of self-defence. Perhaps, then, the best way of obviating this error, was that resorted to by SMITH and MORGAN, JJ., namely: That no facts having been proved on which to base a charge on the law of self-defence, this part of the charge was wholly irrelevant and foreign to the case; and hence, though erroneous, could not have influenced the jury to the prejudice of the prisoner.

For a similar error treated in a similar manner, see Neeley's case, *ante*, p. 101.

NOTE.—We shall endeavor to collect in this note, those American cases which have not been given elsewhere in this volume, which discuss the question whether evidence of the violent and dangerous character of the person slain, in trials for homicide, is competent evidence for the prisoner; and, if so, under what circumstances such evidence will be admitted.

The State v. Tilly, 3 Iredell, 424, Supreme Court of North Carolina, 1843. From the statement of facts, it would seem that Tilly, the prisoner, and Hampton, the deceased, were both planters and neighbors. They had had difficulties; and the prisoner had, down to the time of the killing, made frequent and malignant threats against the deceased; and, if the pris-

owner's witnesses were to be believed, the deceased had made some threats against him. On the day of the killing, the defendant loaded his gun, and went to where the deceased and a negro were riving a log into boards. Shortly after, the negro rode in on the horse of the deceased, stating that the defendant had killed the deceased. The body of the deceased was found near the tree, his skull mashed in, and pieces of the prisoner's gun broken in two, but not discharged, lying near by. As the testimony of negroes was not, at that time, admissible against white persons in North Carolina, there was no evidence of the circumstances which attended the killing, except the defendant's admission that he had killed the deceased, accompanied by a claim that the killing was in self-defence. Although this case has been frequently quoted in cases where the law of self-defence has been expounded, yet, the only ruling on that subject, relates to the *character of the deceased for violence*. The trial court admitted general testimony on this subject, all the witnesses testifying that the deceased was not of a violent and dangerous character, but was a peaceable and orderly citizen; although some of them stated he was addicted to teasing others jocosely. The prisoner also proposed to enquire whether the deceased did not bear the character of being high-tempered, overbearing and oppressive towards his overseers and tenants, but the question was objected to and ruled out.

Upon this ruling, the Supreme Court, by RUFFIN, Ch. J., said: "The Court is of opinion that evidence of the temper and deportment of the deceased towards his overseers and tenants, was properly rejected, for several reasons. In the first place, it was irrelevant, and did not profess to state that the deceased was in the habit of assaulting the persons in his employment, but, at most, of being overbearing to them, and provoking them by arrogant and abusive language. If all that be admitted, it does not raise an argument of an assault by the deceased on the prisoner, but of ill words only, which would not palliate the homicide. And, indeed, in a case in which there is no direct evidence of a mutual combat, or any appearance, at the place, of a scuffle, or any wound on the prisoner, or even the slightest mark of violence, it would be impossible that the jury could rationally infer an attack of any sort by the deceased, or even an effort of defence. Besides, this is not one of those points on which character is evidence. Temper and deportment are not matters to be proved by reputation; but, if they are evidence at all, they can be established as facts only by those who know them."

Upon the last point, this case seems to be at variance with most of the authorities. The rule seems to be, that the bad temper and deportment of the deceased is to be proved by reputation, (where it is permitted to be proved at all,) and not by proof of isolated acts. See note c. to Keener's case, *ante*, p. 547; also what is said in Wesley v. State, *ante*, p. 324; also what is said on the same point in Bottoms v. Kent, *infra*, where this case is criticized.

The question received an exhaustive discussion in Bottoms v. Kent, 3 Jones, Law, 154, determined in the Supreme Court of North Carolina in 1855, before NASH Ch. J. and PRARSON and BATTLE, JJ. The case was an issue of *devisavit vel non*, in which the jury found against the validity of the will, and judgment being entered for the caveator, the propounder appealed.

The script in question was offered for probate, as the last will and testament of one Mourning Kent, by Brittan H. Bottoms, her son-in-law, who is named therein as executor, and who, with his wife and children, are the universal legatees therein. The probate was opposed by Ralford Kent, on the ground that the execution of the script was procured by threats of violence made by the propounder, and several witnesses were examined, whose testimony tended to show that fact. The propounder was then allowed to prove, that the deceased "was a woman of independent mind, and firm in her purposes." He also offered to prove, that he was "a man of easy, quiet temper, and facile disposition, and, therefore, not likely to exhibit the conduct charged." This latter testimony was rejected by the Court. For this, the propounder excepted.

Moore, Dortch and Rogers, for the propounder; *Miller, Bryan and Lewis*, for the caveator.

PEARSON, J.: "This question is presented: upon an issue *devisavit vel non*, there is evidence tending to show that the propounder had procured the execution of the script by threats of violence; ought he to be allowed to prove that 'he was a man of easy, quiet temper, and facile disposition, and, therefore, not likely to exercise, or attempt the exercise of the influence charged?' And, taking the question broadly, ought the caveator to be allowed to prove that the propounder is a man of violent temper, and, therefore, liable to make threats?"

"In an action for seduction, the defendant offered to prove, that 'he was a modest, retiring man.' This evidence is held inadmissible, and the general rule is announced, 'evidence of the character of a party is not admissible, unless it be put directly in issue by the nature of the proceedings.' *McRae v. Lilly*, 1 Ired. Rep., 118.

"On an indictment for murder, evidence of the temper and deportment of the deceased is inadmissible. *State v. Tilly*, 3 Ired. Rep., 424, [*supra*].

"In an action for a malicious prosecution, evidence of the character of the defendant, in respect to sobriety, is inadmissible; and *McRae v. Lilly*, is treated as settling the rule. *Beal v. Robeson*, 8 Ired. Rep., 276.

"Again: it is decided that evidence of the general character of the deceased as to temper and violence, is inadmissible. *State v. Barfield*, 8 Ired. Rep., 344, [*ante*, p. 618].

"The only opposing case is *State v. Tackett*, 1 Hawks Rep., 210, [*ante*, p. 615]. It is overruled by *Tilly's* case, or so emasculated as not to be able to generate a principle, and is expressly confined to its peculiar circumstances. See note of Cowan and Hill, Phil. on Evidence, 461, note 345, and the remarks of Ruffin, Ch. J., in *Barfield's* case. Indeed, *Tackett's* case is not supported by any authority, either in the English Reports or our own, and the Judges yielded to the seeming hardship, in the application of the general rule. Had the case been reversed, so as to present the question, was it admissible for the State to prove the deceased was mild and submissive in his temper, we presume an exception would not have been made to the general rule.

"Our question, therefore, is settled, unless there be some ground for a distinction in regard to the probate of wills. If evidence of the temper and disposition of the deceased, on a trial for murder, or of the defendant in a civil action, is inadmissible, it would seem to follow, it is alike inad-

missible in a trial *before a jury*, touching the execution of a will. *Goodright v. Hicks*, Bull. N. P., 296, is an authority to that effect. In ejectment by an heir-at-law, to set aside a will, because obtained by fraud, evidence of the good character of the deviser is inadmissible—see 2 Starkie on Ev., 215; 1 Phil. on Ev., 174—although, if of good character, it would be *less likely* that he had practiced the fraud imputed.

“*Mr. Moore*, [counsel for the propounder], attempts to get rid of these authorities, on two grounds: 1st. The offer in this case was to prove the temper and disposition of the propounder *as facts*, not as character, or general character and reputation. 2d. There is a distinction in regard to the probate of wills. He relies on *Davis v. Calvert*, 5 Gill & John., 371, and a passage from *Swinburne*, 452, 453.

“This makes it necessary to examine the grounds upon which such evidence is held inadmissible, upon the trial of indictments and civil actions, so as to determine whether the principle is general or restricted in its application. This examination leads us to the conclusion, that the rule is based on two general grounds: 1st. It is too remote. 2d. The objections to the mode of proof. Consequently, the principle is general, and the rule is applicable to all *jury trials*.

“As to the first: It is a rule of evidence, that no testimony is admissible, unless it be relevant and connected with the fact in issue, so as to have a tendency to aid the jury in finding, with certainty, and not mere probability. This rule is based, among other considerations, upon the ground that the admission of such testimony could render jury trials complicated, and tend to confuse and mislead, and induce juries to give their verdict upon conjecture, and not upon a conviction of the truth of the matter alleged, and would, in many instances, work further injustice, and take the opposite party by surprise, as he is presumed only to come prepared to disprove or explain matters relevant and connected with the issue joined, and not to go into collateral acts.

“For the sake of illustration: upon a plea of usury, the defendant offers to prove that, shortly before the debt sued for was contracted, the plaintiff had taken usurious interest from a third person, or from himself; or to prove that he was in the habit of lending on usurious interest. This evidence is inadmissible. The fact that the plaintiff exacted usury on yesterday, has no tendency to aid the jury in finding with certainty that he exacted it to-day, although it makes it more probable; and the jury would be more likely to find the issue in favor of the defendant, which is the very thing a plaintiff would have a right to complain of; because he is not presumed to come prepared to go into every transaction of his life. So, on a question as to the precise terms of an agreement to let premises, although it might assist the jury to make a guess, if evidence was admitted as to the terms on which the landlord had rented to his other tenants, the evidence is inadmissible as too remote. *Carter v. Fryke*, Peake's Rep., 95; *Spenceley v. DeWillott*, 7 East, 108. So, in *Capt. Vaughan's case*, who was indicted for adhering to the King's enemies, by cruising on the King's subjects, in a vessel called the ‘*Loyal Glencarty*’ the counsel for the Crown offered to prove, that he had, sometime before, cut away the custom-house barge, and had gone a cruising in her. This evidence was rejected; for, were it true, it was no sort of proof that the prisoner had

cruised in the Loyal Glencarty. This case is cited in Foster Crown Law, 246; and that very eminent Judge adds, 'the rule rejecting all manner of evidence in criminal prosecutions, that is foreign to the point in issue, is founded in good sense and common justice; for no man is bound, at the peril of life or liberty, fortune or reputation, to answer at once and unprepared, for every action of his life. Few, even of the best men, would choose to be put to it.' 'The common law, grounded on the principles of natural justice, hath made the like provision in every case.'

"I am here reminded of a case which occurred a few years ago in Paris. A woman was tried for the murder of her husband by poisoning. The evidence was circumstantial. The officer for the prosecution offered to prove, that ten years before, while a single woman, she *had stolen* some jewelry. The evidence was admitted, on the ground that it tended to show that she was a person likely to commit murder; and, thereupon, she was convicted and executed for murder.

"What a striking contrast this case presents in favor of the rule of the common law, by which a prisoner can not be prejudiced by proof of his general character, much less by proof of particular acts!

"The prisoner is permitted to rely on his good character, and this, of course, lets in similar proof on the part of the prosecution, as the prisoner has made his character a part of the issue. But this is an exception to the general rule, *in favorem vite*.

"Best, in his Principles of Evidence, makes these remarks: 'The rule that evidence which is too remote is inadmissible, may be stated thus: that, as a condition precedent to the admissibility of evidence, either direct or circumstantial, the law requires an *open and visible* connection between the principles and the evidentiary facts, whether ultimate or subordinate. This does not mean a necessary connection that would exclude all presumptive evidence; but such as is reasonable, and not latent or conjectural.' Sec. 85. It may, perhaps, be objected, and, indeed, Bentham's Treatise on Judicial Evidence is founded on the notion that, by 'exclusionary rules' like the above, much valuable evidence is wholly sacrificed. Were such even the fact, the evil would be amply outweighed by reasons already assigned for imposing a limit to the *discretion* of the tribunals.

"According to the rule that testimony is not admissible, if too remote, evidence of character is never received, unless, from the nature of the proceeding, it is involved in the issue; but when the very nature of the proceeding is to put in issue the character of any of the parties, it is not only competent to give general evidence of character, but to enquire into particular facts tending to establish it. Bull. N. P., 296. Thus, on an indictment for keeping a common gaming or bawdy-house, the prosecution may give in evidence any acts of the defendant which support the general charge. In actions for seduction or *crim. con.*, the character of the woman for chastity being directly in issue, may be attacked, either by general evidence of her character in that respect, or by proof of particular acts of it. In indictments for rape, the prisoner may show the general character of the woman in respect to chastity, or show particular acts of criminal connection with himself. In Clark v. Periam, 2 Atk., 337, the Vice-Chancellor says: 'This is the practice in all cases where the general behavior or quality, or circumstance of the mind, is the thing in issue; as, for instance,

in *non compos mentis*, it is the experience of every day that you give particular acts of madness in evidence, and not general [evidence] only, that he is insane. So, when you charge that a man is addicted to drinking, and liable to be imposed upon, you are not confined, in general, to his being a drunkard, but particular instances are allowed to be given.'

"With respect to witnesses, the credibility of a witness is always involved, and his character or general reputation as a man of truth or of honesty, is admissible; but the individual opinions of witnesses, and particular facts, are excluded on the ground that the character of the witness is only involved incidentally; and, although a man is presumed to be, at all times, prepared to prove his general reputation, yet he is not presumed to be prepared to go into a history of his life, unless the party chooses to take it from the witness himself; then his answer is conclusive.

"There are but few instances in which the trait of character in regard to being of an easy or quiet temper and facile disposition, can be involved in the issue; because such matters do not often affect legal rights. Indeed, the instances seem confined to cases where a testator or donor is alleged to have been imposed on, and the instrument obtained by fraud and undue influence. There, the trait of character of the testator or donor, as being of a facile disposition, or otherwise easy to be imposed on, being involved in the issue, evidence in regard to it may be given; but no case is found where, on a *jury trial*, evidence has been admitted in regard to these traits of character of any one, other than the person alleged to have been imposed on.

"2d. As to the mode of proving character. The word has two meanings; to this may be ascribed the confusion of ideas met with in some of the cases. 'CHARACTER: The peculiar qualities impressed by nature or by habit on the person, which distinguish him from others; these constitute *real* character. The qualities which he is supposed to possess, constitute his *estimated* character or reputation.' Webster's Dic.

"Is a man honest? is he good natured? is he of a violent temper? is he modest and retiring, or impudent and forward?—these all constitute traits of character and *are facts*. But there is an essential difference between facts of this kind, and facts of the kind ordinarily dealt with on jury trials. The latter are known directly by the senses, as by seeing or hearing a thing; the former can only be known indirectly and by inference from acts. A witness called to prove them, can only give the opinions which he has formed by his observations of the conduct of the person under particular circumstances. For instance, the witness will say, 'the person is good-natured, or has a violent temper; because I have seen him act with forbearance or violence under certain circumstances.' Such traits of character being only susceptible of proof by the individual opinion of witnesses, formed from an observation of particular acts, which necessarily lets in the history of a person's whole lifetime, evidence in regard to them is inadmissible on jury trials, except in a very few instances, and only where they are involved in, and form part of, the issue; but never when they arise incidentally.

"Has a man the estimated character or reputation of being honest, or of being good-natured, or passionate, or humane, or cruel? This general character, as it is called, is also a fact; it is the opinion which those who are acquainted with him have formed, in respect to his several traits

of character. There is also a mode of proving real character, which is the object in view; but it is objectionable, because it is a mere approximation, and does not arrive at the fact itself. The opinion of a man's acquaintances that he is honest, or good-natured, etc., does not prove that he is so. Still, this mode of proof is less objectionable than that which depends on the individual opinion of witnesses, and leads to the history of a person's whole life. Therefore, it is admissible in more instances than the other, and is sometimes allowed when a trait of character becomes material, incidentally, and the enquiry is collateral to the issue. For instance, the estimated character, or the opinion which his acquaintances have formed of him in respect of his honesty, is admissible in regard to witnesses; and the least objectionable mode of proof as to their real character, is to show their general character or reputation.

"Thus it is seen, from the authorities and the reason of the thing, that this exclusionary rule, as Mr. Best terms it, is based on general principles applicable to all jury trials; and evidence of character, whether in respect to honesty, or temper, or disposition, is inadmissible by either mode of proof, unless that fact constitutes a part of the issue, or unless it arises incidentally; in which latter case, the evidence is confined to proof of general character or reputation, in regard to the particular trait of character material to the investigation.

"The remarks made above, anticipate in a great measure, the answer to the position taken by *Mr. Moore*, based upon the supposed distinction between character in respect to honesty, and character in respect to being good-natured, or passionate, and so on. He admits that when evidence of the former is admissible, it must be by proof of general character, but contends that evidence of the latter traits of character, may be proved as facts, by witnesses who know them. According to the conclusion drawn above, such evidence is not admissible at all. Of course, the mode of proof cannot make it admissible; and from what is said above, it is seen that the mode of proof he suggests, is more objectionable and more restricted in its application, than the mode which he admits cannot be resorted to. His only authority for the position is a remark of *RUFFIN*, Ch. J., in *Tilly's case*, [*supra*.] After holding that evidence of the temper and deportment of the deceased towards his overseers and tenants was inadmissible, because irrelevant, he adds, 'besides, this is not one of those points of which character is evidence. Temper and deportment are not matters to be proved by reputation; but if they are evidence at all, they can be established as facts, only by those who know them.' The evidence being inadmissible, that remark as to the mode of proof was uncalled for. How can a witness know a man's temper, except by inference from particular facts? No authority is cited, and the remark seems not to have been weighed by the learned Judge with his usual degree of consideration; because the Court of which he was a member, in *McRae v. Lilly*, makes no objection to the mode by which the defendant proposed to establish the fact of his being a modest, retiring man; to-wit, by proof of his general character in that respect. In *Beal v. Robeson*, the same mode of proof was offered, and in *Barfield's case*, he puts the objection to the evidence of the character of the deceased as to temper and violence, on the ground of its irrelevancy, and does not allude to the fact that the mode of proof was by general character

or reputation, although he quotes the remark made in Tilly's case, for the purpose of showing that Tackett's case was doubtful. This objection to the mode of proof would have been decisive of Barfield's case, and presented a ground upon which there might have been a concurrence of opinion, provided he still thought it well founded. This silence in regard to it, although the reference to Tilly's case must have suggested it, shows that the Judges agreed, if the evidence was admissible at all, proof by general reputation was the proper and least objectionable mode.

"As to Davis v. Calvert, 5 Gill and John., 271, it is there decided, upon a contest as to a will, which the caveators alleged was obtained by falsehood and fraud, admissible for the caveators to give in evidence that the testator, a man upwards of eighty-six years old, had been imposed on by a free negro woman, who lived with him as his mistress, and who made him believe that he was the father of her child, and to offer in evidence, facts and circumstances tending to show that the old man was not its father. The decision rests upon the peculiar circumstances of the case, and has no bearing on the question before us. The general remarks are all referable to the passage cited from Swinburne:

"That testament is to be repelled, which is made upon a just fear; which conclusion is both diversely extended and limited. The limitations are: 1st. The testament made by fear is not void *ipso jure*, but voidable by the help of exception, etc. 2d. When the fear is but a vain fear, (for a just fear only, that is, such a fear as may move a constant man or woman, maketh void the testament, as the fear of death or of bodily hurt, or of the loss of all, or most part of one's goods, and such like fear,) whereof no certain rule can be delivered, but it is left to the discretion of the Judge, who ought not only to consider the quality of the threatenings, but also the persons, as well threatened as threatening; and in the threatened, the age, sex, courage or pusillanimity; and in the person threatening, the power, the disposition, and whether he be a mere boaster or a performer of his threats.' Swinb., 475, 476.

"It has been often held in our courts, that, upon the trial of an issue *devi-savit vel non*, evidence of the age and temper of the alleged testator, that he was of a facile disposition and easily influenced, or firm of purpose, is admissible. Indeed, such evidence was received upon the trial of the case now before us; but it has never been held admissible to prove the disposition of the 'person threatening,' or that he was 'a mere boaster, or a performer of his threats.' So the latter part of the passage from Swinburne has never been approved or acted upon. It is true that Williams and Roper bring forward the whole of it; but neither Phillips, Starkie, nor Greenleaf, cite any such rule of evidence as obtaining in the Common Law Courts; on the contrary, they all adopt the general conclusion to which we have arrived.

"It may be further remarked, in reference to the latter part of the passage, evidence that the person threatening was a mere boaster, or a performer of his threats, can have no tendency to show the effect of the threats, unless there be proof that the person threatened *knew* his character in this respect. So this qualification must, at all events, be added.

"If, however, it be assumed that such evidence is admissible in the Ecclesiastical Courts, it is very certain it is not admissible in the Common

Law Courts; and we have a question as to the effect of the Statute which provides that all issues of *devisavit vel non* shall be tried by a jury in the Common Law Courts. Are the latter to proceed according to their own rules of evidence, or are they to import the rules of the former? The difference between trials before a fixed tribunal, which decides the facts as well as the law, and jury trials, is pointed out in *Downey v. Murphey*, 1 Dev. and Bat. Rep., 83, and *State v. Williams*, 2 Jones Rep., 257; and it follows, of course, if there be a difference in the rules, where the statute requires the issue to be tried before a jury in the Common Law Courts, it was intended they should proceed in the trial as in other cases. Trials as to wills of personalty and devises are put on the same footing. The Ecclesiastical Courts never had jurisdiction in respect to the latter; which proves beyond question, that the Common Law Courts are to proceed according to their own rules in regard to both. Mr. Moore says, the idea of having a different rule of evidence in regard to the same question, because the trial is transferred from one court to another, is monstrous. The reply is, the idea of the same court acting upon different rules of evidence, when the principle is the same, is still more monstrous!

"But we apprehend this question does not arise. Swinburne is not laying down a rule of evidence, but is attempting to point out the distinction between a *just fear* and a *vain fear*, 'whereof,' he says, 'no certain rule can be delivered.' He assumes that a threat is established, and confines himself to the enquiry as to the effect it is calculated to have on the person threatened; so the passage does not support the position for which it was cited. Swinburne says, if a threat be made, the character of the person threatening has a tendency to show its effect; the object of Mr. Moore is entirely different; he wishes to prove the character of the propounder as tending to show that *no threat was ever in fact made*. Suppose, with Swinburne, a threat has been made; how can the fact that the propounder is a man of easy, facile disposition, answer the purpose for which, as the case states, the evidence was offered?

"Whether, if a threat be proved, evidence that the propounder is 'a mere boaster, or a performer of his threats' would be admissible to show the nature and effect of the threat; and whether, supposing it to be admissible, the fact must be established by general proof of reputation in that respect, or by proof of particular acts, are questions not now presented. It is sufficient to say, the passage from Swinburne does not support the position that such evidence is admissible in either mode, to prove that the propounder did not make the threat, or was more or less likely to do so, which is the question before us; and does not conflict with the conclusion to which we have arrived."

The judgment was affirmed.

The question again arose, in North Carolina in 1859, in the *State v. Hogue*, 6 Jones, 881. Hogue was indicted for the murder of one Parrish.

Parrish was employed at Winton's hotel, in the city of Raleigh, and Hogue had been a boarder there. On the evening of the day in question, the deceased was in the room where the supper table was set, and, after the usual signal, the door was opened and the boarders commenced entering. The deceased stood beside the door, in the inside, with a stick under his arm, and a pistol in his right hand, and as Hogue was about to enter,

Parrish presented himself in his way and immediately popped the cap before him; whether the pistol was in the direction of his person or not, was left doubtful by the testimony. The prisoner seized the pistol, wrenched it from the hand of the deceased, and immediately commenced stabbing him. He gave him several stabs, and then pushed him upon a side-table and gave him several more while in that position, of which he immediately fell dead. There was evidence of a previous quarrel about dinner time, and subsequently, various threats from the prisoner, to the effect that he would enter the supper-room, and eat his supper there, and if Parrish opposed him, he would slay him. There was evidence that he procured the knife with which the killing was done, for the express purpose of using it in that way; that Parrish had that day demanded of Hogue his bill, and told him that he could board no longer there; that he asked Winton, the tavern-keeper, to let him go in to supper, which he declined. Hogue begged him to let him go in, and offered him a large price if he would do so, but on the landlord's still persisting in his refusal, he declared vehemently that he would go in at all hazards, or any how. Some of the witnesses swore that Winton did not refuse him expressly, but as he turned off, said in reply to the prisoner's declaration that he would go in, "well." There was evidence tending to show that the defendant bought the knife in question, for the express purpose of using it in a fight with Parrish, and that he, in various instances, declared that, if Parrish endeavored to prevent his entering the supper-room, he would kill him. One witness said he saw the prisoner, about half a minute before the bell rang for supper, opened the knife and put it, open, up his coat-sleeve. One other said that immediately after the transaction the prisoner came into Cook's shop where he was, and said "he had killed the damned rascal;" that Cook asked him what he had in his hand; the prisoner showed him a knife and said "he went to old Karrer's and bought it for him," and said, "don't you see the blood on it?" There was much other testimony not material to be stated. All the testimony was submitted to the jury with instructions, not excepted to by the prisoner's counsel, and a verdict of guilty of murder was thereupon found. •

In the course of the trial, the defendant's counsel asked a witness what was the general character of the deceased, which, on objection, was pronounced inadmissible, whereupon the defendant's counsel excepted; and that is the material part of the case in this Court.

The defendant appealed.

PEARSON, Ch. J.: "It is a general rule, that on a trial for homicide evidence of the character and habits of the party killed, as to temper and violence, is not admissible. The State is not allowed to prove that he is a quiet, orderly citizen, nor is the prisoner allowed to prove that he was a violent and outbreking man. The rule is based upon the ground that character is not involved in the issue, and consequently, evidence in regard to it, is immaterial. And there is this further consideration: such evidence is not only immaterial and irrelevant, as having no legitimate bearing upon the matter under investigation, but is calculated to mislead by exciting the prejudice of the jury. For instance, if one kills, either on express malice or malice implied, there being no justification, excuse or mitigation, the fact that the party killed was a good or bad man is immaterial. It is

murder to kill on malice, no matter what sort of a man he is; and yet a jury would be more inclined to convict, if he was a good man, than if he was a bad one; and there is no telling the extent to which the prejudices of a jury may be excited, and how far they could be misled by evidence of this kind. It is, therefore, important to the due administration of the criminal law, that this well settled rule of evidence should not be relaxed.

"There may be exceptions to the rule; *State v. Tackett*, 1 Hawks, 211, is admitted to be one; but we are not at liberty to enter into an investigation for the purpose of defining the principle on which exceptions may be allowed, or of fixing the limits; for the case now before us certainly comes within the operation of the general rule; and it is sufficient to refer to *Bottoms v. Kent*, 3 Jones Rep., 154, [*supra*], and to *State v. Barfield*, 8 Ired. Rep., 344, [*ante*, p. 618], to show that the general rule is settled, both in civil and criminal proceedings.

"The deceased committed a violent assault upon the prisoner as he entered the room. This was legal provocation, and if the case stopped there, the killing would be manslaughter, and the character of the deceased as a quiet or violent man, would be immaterial. But the case did not stop there; for the jury, under instructions of which the prisoner had no right to complain, find that he killed 'of his malice aforethought'; that he had formed the deadly purpose, prepared the weapon, and sought that particular time and place to do the deed. So the character of the deceased was immaterial. It is surely murder to kill with malice express or *aforethought*, no matter how violent or wicked the deceased may be." * * *

The judgment was affirmed.

State v. Thawley, 4 Harrington, 562. Superior Court of Delaware, Fall Sessions, 1847. BOOTH, Ch. J.; HARRINGTON, MILLIGAN and WOOTEN, JJ.

This was an indictment for murder. The defence set up was that the blow was struck in self-defence; and a witness was asked whether the deceased was not a violent man, and in the habit of attacking others with dangerous weapons. It was objected that the character of the deceased was not in issue, and after argument, the Court, (HARRINGTON *dubitante*), rejected the evidence.

BOOTH, Ch. J.: "The testimony offered is the general character of the deceased, as a violent man. From the fact that we cannot find any case in the books where this evidence has been admitted, nor any principle which would admit it, we feel constrained to reject the evidence. We do not see how the character of the deceased as a quarrelsome or fighting man, is in issue. The question is, guilty or not guilty of murder. The homicide being made out, it lies on the defendant to reduce the offence below the grade of murder, and he must do this by evidence of facts, and not by the mere general bad character of the deceased. If such evidence is admissible, it would follow that the character of the prisoner as a peaceable or violent man, must be admissible; for it is certainly as important to know his character as that of the deceased. Yet it is perfectly well settled, that the defendant's character cannot be enquired into, unless he puts it in issue.

"Judge HARRINGTON's doubt arose from the fact, that in four cases within his knowledge, this evidence had been admitted without objection, viz.: *State v. Cochran*, *Elason*, *Saul Thompson* and *Prince Tilghman*. He

thought it might possibly come within the reason of the principle, that 'in particular cases, where the character of the prosecutor is mingled with the transaction in question, it forms a point material to the issue, and may consequently be enquired into. *Rosc. Ev.*, 88.' "

The defendant was acquitted.

The State v. Chandler, 5 La. An., 489. Supreme Court of Louisiana, May, 1850. EUSTIS, Ch. J.; ROST, SLIDELL and PRESTON, JJ. Extract from the opinion of the Court, by PRESTON, J.: "The defendant was indicted for the murder of Patrick C. Dailey, on the 7th of October, 1848, was tried and convicted of manslaughter, and has appealed to this Court.

"It appears by his bill of exceptions, that he offered to prove that the deceased, Dailey, was a quarrelsome man, of violent temper, and dangerous when excited. The Court rejected the evidence, stating that it would not justify Chandler in killing Dailey. The weight of authority is against the admissibility of such evidence, and the objection has been abandoned in this Court. See 1 Whart. Crim. Law, 172; 1 Phillips' Ev., 499; 1 Russell on Crimes, 700. *State v. Tilly*, 3 Iredell, 424," [*supra.*] * * * *

The judgment was reversed on other grounds.

Commonwealth v. Peter York, 7 Law Reporter, 497, 507-509; S. C., 9 Metcf., 93.

York was indicted for the murder of James Norton, in the city of Boston, on the night of July 2, 1844. The killing took place near a dance cellar, kept by one Joe Clash, and which seems to have been frequented mostly by negro prostitutes and sailors. The prisoner was twice tried. At the second trial, at which the present ruling was made, he was found guilty of murder.

Whether we consider this case in view of the patient attention it received at the hands of the Court, or of the exhaustive research and able discussions the questions which arose in it received at the hands of both counsel and Court, there are few criminal cases to compare with it in the American books. In this view, and considering the miserable character of the defendant and his surroundings, it affords a striking illustration of the solicitude with which the law watches over the life and liberty of the meanest citizen in a free country. It is the leading American case on the question of the presumption of malice from the mere fact of killing, and of the burden and *quantum* of proof in trials of indictments for murder. See 2 Lead. Crim. Cases, 504, 536.

The second trial, from the report of which the present extract is taken, took place before SHAW, Ch. J., and HUBBARD and WILDE, JJ. *Samuel D. Parker*, attorney for the Commonwealth, conducted the prosecution, and the Court assigned, as counsel for the prisoner, *George W. Phillips* and *Richard H. Dana, Jr.*

The testimony showed that York and Norton met near the place mentioned, and York beat Norton with something which caused several bruises and clotted his hair with blood, and also stabbed him with a sheath-knife, the blade breaking off in his heart and causing his death. The testimony was conflicting as to whether the killing was in combat. York was a negro: Norton was a white man.

The counsel for the prisoner asked leave to introduce evidence to the

effect that the deceased was a man of notoriously quarrelsome and fighting habits, and boasted of his powers as a fighter. This was objected to as irrelevant.

Dana, in support of the motion: "The vital question here, is whether there was provocation and mutual combat. On this, the whole case turns. There is a lack of satisfactory direct testimony to that point. It must be purely a matter of inference. The jury are entitled to know every fact which can aid them in drawing a right inference. What more important than the well-known character and fixed habits of one of the actors? Do we not so judge in all the affairs of life? In questions of self-defence, evidence of the size and strength of the deceased is admissible. In a doubtful case as to who commenced an assault, in the absence of direct testimony, if one party should be an orderly man, of sedentary habits and peaceable pursuits, and the other a bully and prize-fighter, ought this to be kept from those who are to decide the question? If Norton was such a character, he carried such feelings and habits into this contest this night. It becomes, as it were, a part of the *res gestæ*. The jury should know whom the prisoner was dealing with. This principle is recognized in the books. In *Regina v. Smith*, 8 Car. & Pay., 168, [*ante*, p. 130,] the report says: 'Deceased was a person who boasted of his powers as a fighter.' In *Quesenberry v. the State*, 3 Stew. & Port., 308, [*ante*, page 549, note,] the prisoner was allowed to prove that the deceased was one of a tribe of Indians who had had a feud with the whites in that neighborhood, and were generally considered dangerous persons. [This is a mistake; the offer in *Quesenberry's* case appears to have been simply to prove the bad character of Lewis, the deceased. The counsel evidently refers to *Robertson's* case, *ante*, p. 152.] In *State v. Tackett*, [*ante*, p. 615,] the point in question was distinctly ruled and fully considered by the Court.

"In indictments for rape, or for an assault with an intent, etc., the prisoner may show the general character and habits of the woman as a loose person. This is not to discredit her as a witness. It may be done where she is not a witness. The books put it expressly on a different footing. *Greenlf. Ev.*, § 54; *Rosc. Cr. Ev.*, 88; *Rex. v. Clark*, 2 Starkie, R. 244; 2 Stark. Ev., 365, 368. The question in such cases is, whether there was consent on her part. Her general character and habits are facts from which our inference may be drawn. In this case, the question arises whether the deceased was a person likely to offer provocation or engage in mutual combat. In actions for malicious prosecution, the defendant may show the general bad character of the plaintiff, to rebut the presumption of malice. 2 Esp., 721; 4 Phil. Ev., 258; Addison's R., 246." [The last citation refers to *Robertson's* case, *ante*, p. 151, which is inadvertently cited to the point last taken.—Eds.]

Parker contended that the general character of the deceased was never in issue, nor that of the prisoner, unless he chose to put it in issue. The rule works both ways. The jury would like, perhaps, to know the general character of the prisoner, but the Government could not prove it, though he has the presumption of good character. If the evidence is admitted against the good character of the deceased, and not of the prisoner, the effect would be unfair. No such principle has ever been laid down in any text-book, or in any reports in England or America, except in

the cases cited. In those cases, no authorities are given. General character must be inferred from the *res gestæ*. The analogy of rape does not hold. This is *sui generis*, and the evidence is admitted from policy and necessity, because there is usually no evidence as to the fact, but from the woman, and the evidence as to her character is partly discreditory, and partly to the issue. The crime is easily charged, and difficult of proof.

Phillips replied, and contended that the reason why evidence is not received against the general character of the prisoner, is because he is on trial. It is the privilege of an accused person from public policy. In rape, the books say expressly, that the evidence is not on the ground of its being discreditory. We do not ask to prove particular previous acts, but the well-known habits, pursuits and character of deceased. We do not contend that the general character of the deceased is always in issue. We ask the Court to go no further than a case where direct testimony is wanting, or unsatisfactory, or conflicting, and the *factum probandum* is to be inferred by probable reasoning.

The CHIEF JUSTICE pronounced the decision of the Court: "The general rule unquestionably is, that the general character of neither party can be shown in evidence on trials for homicide. The prisoner has the personal privilege of showing his good character; but unless he puts it in issue, it is not so. The Government cannot prove either quarrelsome habits in the prisoner, or peaceable habits in the deceased. There is no limit, if we go beyond the *res gestæ*. The only exception is rape. This is partly because the woman is a witness, and partly from policy and necessity, as the only protection of the accused. In the case from *Carrington & Payne*, [Reg. v. *Smith*. *ante*. p. 130.] we think the expression probably arose from boasts made by the deceased at the time, and proved as parts of the *res gestæ*. The cases from *Hawks*, and from *Stewart & Porter*, stand alone, and are not of such authority as to require us to leave the established course of practice."

Commonwealth v. Hilliard, 2 Gray, 294. Supreme Judicial Court of Massachusetts, October Term, 1854.

At the trial of the defendant, before Chief Justice SHAW, and Justices METCALF and BIGELOW, on the 25th of May, 1855, for the murder of James L. Warren, there was evidence tending to prove an assault by the deceased upon the defendant, immediately before striking the mortal blow.

J. G. Abbott, for the defendant, offered evidence that the general character and habits of the deceased, were those of a quarrelsome, fighting, vindictive and brutal man, of great strength, as a circumstance tending to show the nature of the provocation under which the defendant acted, and that he had reasonable cause to fear great bodily harm; and cited *Queenberry v. The State*, 2 Stew. & Port., 308, [*ante*, p. 549, note]; *The State v. Tackett*, 1 Hawks, 210, [*ante*, p. 615]; *Oliver v. The State*, 17 Ala., 599, [*post*]; *Commonwealth v. Selbert*, Wharton on Homicide, 227, [*supra*.]

J. H. Clifford, Attorney-General, objected to the inadmissibility of the evidence, and cited *Commonwealth v. York*, 7 Law Reporter, 507-509, [*supra*.]

BY THE COURT: "The evidence is inadmissible. If such evidence were admitted on the part of the prisoner, it would be competent for the Commonwealth to show that the deceased was of a mild, peaceable character.

Such evidence is too remote and uncertain to have any legitimate bearing on the question at issue. The provocation under which the defendant acted must be judged of by the *res gestæ*; and the evidence must be confined to the facts and circumstances attending the assault by the deceased upon the defendant."

Verdict, guilty of manslaughter.

Commonwealth v. Mead, 12 Gray, 167. Supreme Judicial Court of Massachusetts, November Term, 1858. Present, SHAW, Ch. J.; METCALF, BIGELOW and THOMAS, JJ. This was an indictment for the manslaughter of Jeremiah A. Agin. The case was tried in the Municipal Court of Boston, before NASH, J., where the defendant admitted the killing, but contended that it was in self-defence. The Commonwealth offered evidence that the defendant and Agin had a verbal altercation, and Agin advanced with his hand uplifted towards the defendant, who then shot him with a pistol. The defendant offered evidence that Agin advanced and seized him by the throat, while Agin's brother stood near with an uplifted shovel, and that Agin was choking the defendant when he fired.

The surgeon who made a *post mortem* examination testified that the *rigor mortis* was very marked. The defendant, to show that he was in danger of his life from the great strength and violence of the deceased, proposed to ask the surgeon these questions: "Was not Jeremiah A. Agin a very strong and muscular man? Did not the *rigor mortis*, being very marked, indicate that Agin was a remarkably powerful man?" But the Judge excluded them.

The defendant also offered to prove that "Agin was an experienced and practiced garroter." Garroting was said to be seizing a person by the throat in a peculiar mode, which in a very short time takes away life, and deprives a person of his power almost immediately. The Judge excluded this evidence; but allowed the defendant to prove how he was actually seized by the throat, and then to show by experts, the anatomical structure of the parts, and the various effects of such seizure and compression on the individual's consciousness, strength, life and system generally.

BIGELOW, J.: "Evidence tending to prove the great muscular vigor and strength of the deceased was clearly incompetent. It did not show provocation, or that the homicidal act was committed in self-defence, or was otherwise excusable or justifiable. The issue was not as to the degree of strength and violence which the deceased was capable of exerting, but how severe and aggravated was the assault which he actually committed on the prisoner. *Com. v. Hilliard*, 2 Gray, 294, [*supra*.] For a like reason, evidence that the deceased was in the habit of seizing persons in a peculiar manner by the throat was inadmissible. The defendant was allowed to prove the manner in which the deceased actually assaulted him at the time of the homicide, and this was the only evidence on the point which was relevant or material to the issue."

In the *State v. Jackson*, 17 Mo., 544, determined in the Supreme Court of Missouri, in 1853, the question is thus discussed in the opinion of the Court, delivered by RYLAND, J.:

"As to the character of the man shot, (that is, Millsaps,) for danger and desperation, it was properly excluded from the jury. There may be cases

where the general character would be proper evidence before the jury ; it would explain the situation of the parties, and their acts and deeds at the time. But here is a man shot by the prisoner, as he says, thirty yards distant, when the man shot exclaimed, ' he was unarmed ; ' and when the prisoner says ' he would have got the damned old rascal had he not got behind his horse '—a man exclaiming to the prisoner ' not to shoot him, he was unarmed, though not afraid ; ' and yet, the prisoner, when relating the occurrence, stated, ' he would have got the damned old rascal had he not got behind his horse, ' with as much seeming indifference to human life, as though he were shooting at game. ' Would have got him, but he got behind his horse ! ' The bad and dangerous character of the person killed, will not justify his being shot under such circumstances, nor will it tend to mitigate the crime, or lessen the guilt of the manslaughter. The Court below, therefore, committed no error in overruling this evidence."

This last case was an indictment for an assault with intent to kill. Evidence of threats made by the prosecutor against the defendant, and communicated to him before the rencounter took place, was offered and excluded. The rather peculiar ruling of the Court on this point, will be found on page 520. Upon the question of threats, it is overruled in Missouri by Sloan's case, *ante*, p. 518, and Keene's case, *ante*, p. 531, note. Upon the question of the character of the deceased or prosecutor for violence, the rule which now obtains in Missouri is settled by the two following cases.

The State v. Hicks, 27 Mo., 588, determined in the Supreme Court of Missouri, in 1859. The indictment was for murder. Extract from the opinion of the Court, delivered by RICHARDSON, J. : " There was evidence tending to show that bitter hostility existed between the defendant and deceased, and that the latter was a turbulent, violent and dangerous man. It also appeared that the deceased, at the time he received the mortal wound, had a gun, which he snapped once or twice at defendant after the latter had fired ; but doubt is left by the testimony as to the position of the gun, and the attitude of the deceased before he was wounded. On this state of the evidence, the defendant asked the following instruction, which was refused : ' If the jury believe, from the evidence, that the deceased was of rash, turbulent and violent disposition, and that the defendant had knowledge of such disposition, then it is a circumstance for the consideration of the jury, in considering the reasonable cause for defendant's apprehension of great personal injury to himself. ' In my opinion, this instruction ought to have been given. If the defendant killed Mills under circumstances that showed he did not have reasonable cause to apprehend immediate danger of violence to himself, he cannot defend himself on the ground of the vicious character of the deceased ; for the law promises the same protection to the persons of all men, and it is as great a crime in the eye of the law to kill, without cause, a bad man as a good one. But the imminence of danger that will justify us in acting upon the instinct of our nature in repelling a blow before it is received, often depends upon the character of the assailant. The menacing attitude of a person generally peaceable and law-abiding, would often excite no just apprehension of danger, whilst similar conduct of a fierce, vindictive and passionate man, would naturally

alarm our fears and make us prompt in anticipating his purposes. When danger is threatened and impending, we are not compelled to stand with our arms folded until it is too late to strike, but the law permits us to act on reasonable fear; and, therefore, when the killing has been under circumstances which create a doubt as to whether the act was committed in malice, or from a sense of real danger, the jury have the right to consider any testimony that will explain the motive that prompted the accused. *Queenberry v. the State*, 3 Stew. & Port., 306, [*ante*, p. 549, note;] *Monroe v. State*, 5 Ga., 137, [*ante*, p. 467.] The judgment will be reversed and the cause remanded—Judge SCOTT concurring; Judge NAPTON absent."

The question again came before the Supreme Court of Missouri, in the *State v. Keene*, determined in 1872, before WAGNER, BLISS and ADAMS, JJ. As the determination of this question depends peculiarly upon the evidence in each case, the reader is referred to the note on page 531, *ante*, where the facts in evidence in Keene's case are stated. Upon the point under discussion, WAGNER, J., said:

"When the homicide is committed under such circumstances that it is doubtful whether the act was committed maliciously, or from a well-grounded apprehension of danger, it is very proper that the jury should consider the fact that the deceased was turbulent, violent and desperate, in determining whether the accused had reasonable cause to apprehend great personal injury to himself. If such evidence is ever legitimate, the facts in this case show that it was one calling for its introduction." The judgment was reversed. The other Judges concurred. 50 Mo., 357.

In *The People v. Murray*, 10 Cal., 309, determined in the Supreme Court of California, in 1858, evidence of the character of the deceased for violence had been excluded. BALDWIN, J., said—TERRY, Ch. J., and FIELD, J., concurring: "The rule is well settled that the reputation of the deceased cannot be given in evidence, unless, at the least, the circumstances of the case, raise a doubt in regard to the question whether the prisoner acted in self-defence. It is no excuse for a murder that the person murdered was a bad man; but it has been held that the reputation of the deceased may sometimes be given in proof, to show that the defendant was justified in believing himself in danger, when the circumstances of the contest are equivocal. But the record must show this state of the case. This does not. 3 Stew. & Port., 316." *Ante*, p. 549, note. The judgment of guilty of murder in the first degree was affirmed.

In a subsequent case in California, *The People v. Lombard*, 17 Cal., 316, determined in the Supreme Court of that State, in 1861, the prisoner was indicted for the murder of one Lucas. On the evening before the killing, the deceased had threatened to kill the defendant, and these threats were communicated to him that night. Two or three days before this time, the deceased had made like threats, which were then communicated to the defendant. Lucas, on the evening named, was drunk in the street, threatening to kill a man named Williams or defendant; the cause of trouble appearing to be a woman with whom the defendant was intimate, and whom Lucas had whipped. About seven o'clock the next morning, Lucas was crossing the street from a barber's shop, with a bundle of clothes, and

apparently without any weapon, when defendant came rapidly up the street, and addressed him thus: "Defend yourself, you son of a bitch," at the same time drawing a pistol and shooting Lucas in the right side, of which wound he soon died. Defendant then ran up the street. Lucas does not seem to have seen defendant until addressed as stated.

On the trial, after the evidence of the threats and their communication had been introduced, the defendant offered to prove by a witness that the deceased was a quarrelsome, vindictive and revengeful man, for the purpose of showing that the defendant had reason to believe, and did believe, his life to be in danger at the time he met the deceased, and that he acted under that belief at the time the pistol was fired. The Court of its own motion, without objection upon the part of the prosecution, excluded the evidence, defendant excepting.

The defendant was convicted of murder in the second degree, and appealed.

COPE, J., delivered the opinion of the Court—FIELD, Ch. J., and BALDWIN, J., concurring:

"The defendant was convicted of murder in the second degree. On the trial of the case, it was shown that the deceased had threatened to take the life of the defendant, and that these threats were communicated to the latter before the killing. It did not appear that the threats were followed by any overt act, and under the circumstances, the mere apprehension of danger was insufficient to justify the homicide. The evidence offered in relation to the character of the deceased, was properly excluded. Such evidence is admissible only where the immediate circumstances of the killing render it doubtful whether the act was justifiable or not." * * The judgment was affirmed.

The question again arose in the Supreme Court of California, in 1871, in the case of *The People v. Edwards*, 41 Cal., 640. Edwards was convicted of murder in the second degree, and appealed.

Upon the point in question, WALLACE, J., speaking for the Court, said: "The prisoner offered to show that the deceased was a man of violence, of turbulent character, and blood-thirsty. The evidence was excluded, and, we think, properly. The deceased was unarmed when he was assaulted; and the prisoner approached him from behind, and, while the deceased was peaceably conversing with an acquaintance, shot him in the back, the ball entering his body 'a little to the left of the backbone, nearly at the edge of the shoulder blade,' giving him a mortal wound; and when he had fallen, the prisoner shot him again, and a third time, each wound being, in the opinion of the medical witness, mortal. It is said, in *People v. Murray*, 10 Cal., 310, [*supra*], that if a contest has occurred between the deceased and the prisoner, 'the reputation of the deceased may sometimes be given in proof, to show that the defendant was justified in believing himself in danger, when the circumstances of the contest are equivocal.' But here there was, confessedly, no contest, nor even an altercation between the deceased and the prisoner at the time of the killing; for, as we have seen, the shot was fired from behind; and the deceased does not seem to have been even aware of the proximity of the prisoner at the moment. Under such circumstances, the character of the deceased, as being peaceable or otherwise, is of no import. Bad as it may have been, the prisoner

had no right to kill him on that account. The bad character of the deceased, when allowed to be proven, should tend, in some degree, in connection with the immediate circumstances under which the killing was done, to show that the prisoner had sufficient grounds, as a reasonable man, to fear that he was himself about to receive at the hands of the deceased, some great bodily harm, and that he acted under the influence of that fear in killing him. There must be some fact transpiring at the time of the killing, indicating the then immediate purpose of the deceased towards the prisoner to be hostile, or, at least, equivocal in its character, and which may be illustrated by the known reputation of the deceased, if he had one in the community, as a man of violence, etc. Here there was no such fact, and the enquiry into the character of the deceased was correctly disallowed."

The judgment was reversed on other grounds.

The question came before the Supreme Court of Kansas, in 1864, in *Wise v. The State*, 2 Kan., 419. BAILEY, J., delivering the opinion of the Court, said :

"The second exception was to the ruling of the Court refusing to permit Mrs. Baillie to answer the following question, to-wit: 'If you know, state to the jury the character and temper of the deceased, Robert Baillie, when angry and excited, and whether or not he was, at such times, a dangerous or desperate man.'

"The general rule on this subject is thus stated by Wharton: 'On the trial of an indictment for homicide, evidence to prove that the deceased was well known and understood generally by the accused, and others, to be a quarrelsome and savage man, is inadmissible.'

" 'The rule undoubtedly is, the character of the deceased can never be made a matter of controversy, except when involved in the *res gestæ*.' Am. Crim. Law., § 641."

The learned Judge then quoted from *Com. v. Hilliard*, (*supra*) and *people v. Murray*, (*supra*), and concluded that the testimony was inadmissible.

The question was ruled otherwise in *Payne v. Commonwealth*, 1 Metcalf, Ky., 370. This case was determined in the Court of Appeals of Kentucky, in 1858, by SIMPSON, Ch. J., STITES, DUVALL, and WOOD, JJ. The facts of the case are not stated in the report. Extract from the opinion of the Court, delivered by DUVALL, J. :

"The other point relied upon by the appellant, may be very briefly disposed of. The record contains two bills of exceptions, one of which is certified by the Judge, the other by two by-standers, and filed, also, as part of the record, according to section 367 of the Civil Code, which, by section 227 of the Criminal Code, regulates the mode of preparing and signing bills of exceptions in criminal cases. Numerous affidavits were procured by the appellant, for the purpose of maintaining the truth of the exceptions certified by the two by-standers. From the bill of exceptions certified by the Judge, it appears that testimony was admitted on the trial which conduced to show that White was a man of violent, cruel and blood-thirsty temper and disposition; that he was in the constant habit of carrying concealed deadly weapons, and was scarcely ever known to be out of his house

without them. It is stated in the other bill of exceptions, however, that all the evidence to this effect was excluded by the Court. There thus appears to be no difference of opinion between the Court below and the counsel for the appellant, as to the competency of the testimony, but the whole controversy is confined to the question of fact whether it was rejected or admitted upon the trial. This question it is wholly unnecessary that we should consider or determine, inasmuch as the judgment must be reversed upon other grounds. We are of opinion that the testimony in question was admissible, in view of all the other proof as presented by this record. The general principle upon which the admissibility of such evidence depends, was recognized by this Court in the cases of *Rapp v. Commonwealth*, 14 B. Mon., 640, *ante*, p. 293; of *Meredith v. Commonwealth*, 18 B. Mon., 49, *ante*, p. 298; and *Cornelius v. Commonwealth*, 15 B. Mon., 546; *ante*, p. 569; although the point was not in either of those cases directly presented. Numerous cases decided by the Courts of other States, furnish conclusive authority upon this subject, a reference to which is to be found in Wharton's American Law of Homicide, p. 229, where the doctrine is thoroughly and ably discussed. See, also, *Pritchett v. State*, 23 Ala. Rep., 39, *ante*, p. 635."

The following view was taken by the Supreme Court of Minnesota, in the case of *The State v. Dumphrey*, 4 Minn., 438, which came before it in 1860. FLANDRAU, J., delivered the opinion of the Court. * * * "The fourth point made by the counsel for the prisoner, has been a little more difficult of solution. But we are fully satisfied that the authorities do not sustain the position of the prisoner's counsel in his offer. The character of the deceased, *per se*, can never be material in the trial of a party for killing him, because it is as great an offence to kill a bad, as it is to kill a good man, or to kill a quarrelsome and brutal man, as it is to kill a mild and inoffensive man. Therefore, if the killing is proven to have been with a felonious intent, the character of the deceased can in no manner affect the result. The rule in respect to the admission of proof of the quarrelsome or violent character of the deceased, is this: 'Where the killing is under such circumstances, as to create a doubt as to the character of the offence committed, the general character of the deceased may be shown, because then it becomes a material and, perhaps, necessary fact, to enable the jury to ascertain the truth, and, as such, is involved in the *res gestæ*; but, without the character is in some way an essential part of the *res gestæ*, it cannot be examined into; because it would be a barbarous thing to allow A. to give as a reason for killing B., that B.'s disposition was savage and riotous.' Am. Crim. Law, 3d ed., 296. It was held in the trial of an overseer for the murder of his employer, that it was not competent for the prisoner to prove the general temper and deportment of the deceased towards his overseers and tenants. *State v. Tilly*, 3 Iredell, 424, [*supra*.] When, however, it is shown that the defendant was under a reasonable fear of his life from the deceased's temper, in connection with previous threats, etc., it is sufficiently part of the *res gestæ* to give in evidence as explanatory of the state of defence in which the defendant placed himself. Wharton on Homicide, 215, 220; Am. Crim. Law, 296.

"The principle upon which this testimony alone is admitted, arises from some peculiar condition in which the facts of the killing, as proved, leave

the crime. If the facts, as established, free the case from uncertainty and doubt, and leave the killing an act of premeditated design on the part of the defendant, the quarrelsome character of the deceased can in no manner change the nature of the offence; but if circumstances surround the transaction, which leave the intention of the defendant in committing the crime, doubtful, or evenly balanced, or in any manner indicate provocation on the part of the deceased, testimony of the quarrelsome character of the deceased would then become sufficiently part of the *res gestæ* to be admitted to explain or throw light upon the encounter.

"The books make a distinction between allowing proof of the bad character of the deceased, and the good character of the accused, and place it upon the ground, that, as all reasonable doubts are to be weighed in the balance in favor of the defendant, he is, therefore, entitled, in all cases, to give his good character in proof, because, what would be a clear state of facts and circumstances to warrant a conviction against a man of bad or unknown character, might, when applied to a man of high standing and unimpeachable character, appear inconsistent with his guilt, or so enshroud the transaction with doubt as to justify an acquittal. It will also be found, as a general rule, that when the facts are clear that the crime has been perpetrated, the good character of the accused should have no weight with the jury, because it is none the less a crime for a man of good character to kill another, than for the vilest of the human race to commit the same act.

"We will not undertake to discuss these distinctions; suffice it to say, that the rule is well established that proof of the good character of the accused may always come in, and, after it is in, its weight will be matter of consideration for the jury, under the instructions of the Court, which will always vary, as the other proof is clear or doubtful, positive or circumstantial, in each particular case; and we think it is equally well settled that proof of the quarrelsome character of the deceased, can only be allowed when, from the nature of the main proof in the case, such character becomes in some way involved in the *res gestæ*; when admitted, its weight with the jury should be governed very much by the same rules that apply to the good character of the accused."

In *Reynolds v. The People*, 17 Abb., 413, cited in the principal case, in the note on page 655, the defendant was indicted for murder in stabbing one Patrick Mathews. The facts are not stated in the report. In the course of the trial, the counsel for the prisoner propounded the following question to a witness: "Do you know what the character of Patrick Mathews was in this community for the ten years during which you knew him, as a dangerous, violent and quarrelsome man?" The question was objected to and excluded, and the prisoner excepted. The jury returned a verdict of manslaughter in the third degree; and the case was brought before the Supreme Court of New York, in general term, by certiorari, in February, 1864.

SUTHERLAND, P. J.: "The only material question in this case is as to the admissibility of the evidence offered by the prisoner to show that the character of Mathews, the deceased, in the community, was that of a dangerous, violent and quarrelsome man. The Recorder excluded this evidence. In my opinion the evidence was properly excluded.

"I cannot find any evidence in the case tending to show that the prisoner and Mathews were acquaintances, or that they had ever seen each other before the affray. There was no proof of any previous relation, from which it might be presumed that the prisoner knew Mathews' character, good or bad. If Mathews' character was so notoriously that of a dangerous, violent and quarrelsome man, I find nothing in the case authorizing the inference that the prisoner supposed, or thought, when he stabbed the deceased, that he was Patrick Mathews. At or about the commencement of the affray, some one called out, 'Pat.' There was no evidence that it was the prisoner; the inference from the evidence is, that it was one of the Mathews' party.

"Under these circumstances, how would proof of Mathews' notorious character for violence, etc., have tended to show that the prisoner believed himself in danger, when he saw Mathews approaching him? How Mathews' character could have influenced, or had anything to do with the motives of the prisoner's action, I cannot see. In my opinion, under the circumstances of this case, the evidence was properly excluded.

"Perhaps such evidence might be admissible, when, from the previous relationship of the parties, or from other circumstances of the case, it would be reasonable, to presume that the prisoner might have acted from a knowledge of the character of the deceased for violence, etc. See Whart. *Hom.*, 229; Whart. *Crim. Law*, § 641; *State v. Field*, 14 Maine, 428, *ante*, p. 629; *State v. Tilly*, 3 Ired., 424, [*supra*.]

"The proceedings in the court of General Sessions should be affirmed, and that court should proceed, and sentence the prisoner on his conviction."

CLERKE and BARNARD, JJ., concurred.

In the *Commonwealth v. Seibert*, a case which has been often quoted upon the question under discussion, and which will be found quoted at considerable length in Wharton on Homicide, 227-239, the prisoner being upon trial for murder, contended that the killing was done to save his own life from a furious attack of the deceased. Dr. Wharton states that "the Court, for the purpose of aiding in the discovery of the character of the homicide, permitted the defendant to prove the general character and disposition of the deceased, as a quarrelsome, fighting, vindictive and brutal man, of great physical strength, rejecting, however, evidence of particular instances of his brutality in fighting, etc."

And CONYNGHAM, J., in charging the jury, said: "When you ascertain from the evidence, the manner of the admitted killing, if you find it to have been done in defence of an attack by the deceased, in deciding upon the character of the offence, you are called upon to examine and revise everything which goes to explain the true situation of the parties at the time; their respective feelings and intentions, shown by their acts, their threats and menaces, as may be proven; and you may consider, too, their relative characters as individuals, including their strength and physical ability. You may enquire, too, whether the deceased, making, as is contended, the first assault, was bold, strong, and of a violent and vindictive character, and the defendant much weaker and of a timid disposition, and how far their power was equalized by the weapons in the hands of the latter. Legal rules are general, but in their application they must at times depend

upon the special circumstances of particular cases. In the assault of a strong man upon a boy or female, of a powerful individual upon a weaker, the necessity of taking life in self-defence under an ordinary attack, will be more easily discoverable, than in an attack by one man upon another under more equal circumstances. The probable ability to defend without the fatal resources, must depend upon the means and power of defence in the assaulted. Moral power, too, is important in sustaining physical power. Timidity of disposition will never excuse rashness, and will not justify the creation or sustaining of imaginary fears, so as to excuse the taking of the life of another; but we say now, as we had occasion to say in this court some years since, in the trial of Joseph Davis, that the jury may, in deciding upon the degree or kind of homicide, the nature of the attack and the necessity of the defence, consider this ingredient in the character of the slayer, as an adjunct to his proper physical power, or rather weakness. You are to look at the parties in this unhappy transaction, in their relative knowledge of each other's character and strength, and to consider the circumstances attendant upon the contest of Saturday, their respective feelings, and all the other circumstances as already called to your notice; to enquire whether the defendant, as the evidence shows him *to be*, the man that *he is* and *was*—not as one of greater courage and strength may be, but as *he was* when he did the act—had clear reason to believe that in case of an attack upon him by the deceased, (the man that the evidence shows him to have been,) he would be in danger of loss of life or common bodily harm; and if you do so find, and further, that an attack, apparently of such intent and character, was made upon him, and in a room described as this has been, with no other means of escaping the contest, as contended by the defendant's counsel, under the evidence, but by taking the life of the assailant; he would be excused in so doing, even though this, to him, reasonable belief of the horrible result of such a contest, should be produced partially by the constitutional timidity of his own character, doubly excited by the comparative weakness of his own bodily ability, proved in the contest with the assailant of the day previous. Look you into the heart of the defendant at the time of the transaction; search out his motives, as his acts and declarations show them, and say whether he, constituted as nature made him, and with all his means of defence, had reason to believe, and did believe, that he *was* in the serious danger spoken of

It may be stated that the view above taken by Judge CONYNGHAM, that the constitutional timidity of the prisoner may be looked to in determining whether he ought to be excused in using the means and degree of force he did in his defence, is contrary to the almost unanimous weight of authority. See note to Grainger's case, *ante*, p. 242, *et seq.*, and particularly pp. 249, 250, where Bryson's case and Shultz' case are cited. But contra, Oliver's case, *post*. The language of Judge CONYNGHAM, however, accords with the dictates of humanity, if not with the principles of reason; and there is, doubtless, much room for debate upon this question in its general aspect. A man is obliged to act, in every emergency, with the faculties, physical, mental and moral, which God has given him; and when he has acted in good faith, though upon cowardly fears, shall he be punished criminally for doing that, which a man favored by nature with stronger nerves and

cooler judgment would not have done? The real objection to the admission of such testimony consists in the danger of imposition being practiced upon juries, which are generally composed of inexpert, and frequently of ignorant men. And it is believed that the exclusionary rules of evidence, so termed by Bentham and Best, are, in point of fact, grounded more directly upon this difficulty than on any supposed inconvenience that would accrue from the investigation of collateral issues. Could it be found consistent with the liberty of the citizen, and the policy of republican institutions, to try criminal causes by mixed juries, composed in part of legal and medical experts, and in part of laymen, it is believed that objections to the admission of testimony of threats made by the deceased or prosecutor against the defendant, or of the character of the deceased or prosecutor for violence, or of the peculiar mental or moral weakness of the defendant, would lose much of their force, and would soon pass out of the books. These thoughts are, however, thrown out as speculations merely; for, while it is true that the common law system of trial by jury is being tested to its utmost limits in the United States, and is frequently as uncertain in its results as the old trial by wager of battle, and has shown itself, in some instances, oblivious of the rights of accused persons, and, in many others, utterly inadequate to the protection of society; yet, it is also true that the substitution of a new system for an old, not only in many cases fails to remedy existing evils, but, what is worse, not unfrequently produces a train of new evils, unanticipated and unprovided for.

Upon the facts of a later case, a different conclusion was reached by the Supreme Court of Pennsylvania. We allude to *Commonwealth v. Ferrigan*, 44 Penn. State, 386, determined in 1863. The prisoner had been convicted of murder in the second degree, and applied to the Supreme Court for a writ of error. This was refused. The facts are not stated, but THOMPSON, J., in pronouncing the opinion, said: "The questions, what was the deportment of the deceased generally as to violence of character? and what were his threats towards Ferrigan? and what was Williamson's deportment when he came from the army, towards his family? were properly overruled by the Court. The bad conduct of the deceased, and his violence of temper, did not justify or excuse the prisoner in taking his life. Society had not appointed him to be his keeper and executioner. For infirmity of temper and abuse resulting from it, the law has provided its appropriate punishment. Certain it is, that there was no evidence that we have seen to show that the prisoner was impelled by any such violence to kill him in self-defence."

The views of the Court of Appeals of South Carolina on this question, are found in the *State v. Smith*, 12 Rich. Law, 430, 440. This was a case of murder. The original reporter has omitted the testimony, not deeming it necessary to a proper understanding of the case. We think, however, that the value of this case as a precedent upon the point under discussion, is greatly diminished by reason of this omission. In pronouncing the opinion of the Court, JOHNSON, J., said: "It appears from the report of the trial, that when Daniel Fogartie, a witness for the defence, was on the stand, *Mr. Simons*, the prisoner's counsel, proposed to show by this and other testimony, that the deceased was a turbulent and violent man, and carried arms about him, and that this was generally known, which evidence,

as to deceased, was ruled out. This forms the first ground of appeal. When Michael McFeeny was sworn for the prisoner, *Mr. Simons* said: 'I propose to show, that on the day before the occurrence, (the death of Saffron) the deceased and witnesses were employed together, and that this witness was with them; that deceased then exhibited a quarrelsome and violent disposition, and attacked the witness: and that, on this occasion, the prisoner interposed and separated them; and that the deceased had threatened the prisoner.' The question was argued, and the testimony finally ruled out. This constitutes the second ground of appeal.

"The Circuit Judge says: 'In reference to the first ground of appeal, I did exclude the evidence which was offered in reference to the character of the deceased, upon the authority of the doctrine laid down in 3 Greenl. Ev., § 37, at the same time intimating the opinion that if it had been doubtful whether the killing was from a just apprehension of danger, and in self-preservation, I should have held it admissible, upon the authority of *Monroe's case*, 5 Ga., 85, (*ante*, p. 442). I also excluded the proposal referred to in the second ground of appeal.'

"The appeal from this ruling raises questions of no ordinary importance, though the principles governing them do not appear to be unusually difficult.

"Lord Camden, in the memorable debate on Fox's bill, [16 May, 1792, 5 Camp. Lives of Chancellors, 342,] while contending for the right of juries to render a general verdict, in cases of *libel*, illustrated his position by referring to cases of homicide. Speaking of intention, he argued: 'A man may kill another in his own defence, or under various circumstances which render the killing no murder. How are these things to be explained? By the circumstances of the case. What is the ruling principle? The intention of the party. Who decides on the intention of the party? the Judge? no, the jury. What is the oath of the jury? Well and truly to try the issue joined, which is the plea of *not guilty* to the whole charge.'

"This passage shows, in a striking manner, that the *intention* and not the mere formal act, is the essence of crime; and that the necessity of embracing the fact and intention in a verdict of guilty or not guilty, gives the solution of the whole issue to the jury. As this great master of the law truly says, 'the ruling principle is, the intention of the party to be decided, not by the Judge, but by the jury, from the circumstances of the case.'

"When the State proves the killing without more, the law infers a criminal intent, and throws on the prisoner the necessity of explaining away this legal presumption; and how can he do it, his intention depending upon the circumstances, unless he be allowed to show what the circumstances were? I have been accustomed to think that the circumstances that surround a man always serve to throw light, not only upon his language, which is known law in another forum, with which I am more familiar than with this [see 5 Rich. Eq., 155], but also upon his acts. The words uttered, the language written, the acts done, speak for themselves, and are the only subject of interpretation; but they are read and interpreted in the light of the circumstances which prompted them, and to which they always tacitly refer. The same act done under different circumstances, may have a very different meaning. If a man slay another in battle, he is

a hero and a patriot; if, while repelling a criminal and dangerous assault on his person or his house, it is a defensive and rightful act. If it is done under that degree of provocation, which would work up the infirmities of a man of proper social feelings and of peaceable disposition, to the hasty shedding of blood, it is manslaughter. The circumstances must determine the intention and the case.

"I do not mean the mere circle of facts immediately surrounding the parties at the moment of the fatal act; but the facts more or less remote, according to the case, which may reasonably be supposed to have been in the minds or contemplation of the parties at that time; the facts to which their conduct may be supposed to have tacitly referred—the facts which may be reasonably intended to have prompted the fatal act. When the jury who are to decide on the intent have these facts before them, and not till then, they have the means of intelligent and conscientious judgment.

"The authorities quoted in argument for the prisoner, give full support to his motion. I regret that, in the heavy business of this Court, neither my time nor my strength permits me, as I would desire, to bring out in this opinion, such portions of the authorities as would, in my judgment, show the law to be as I have stated. I cannot, however, refrain from pointing particularly to the case of *Monroe*, plaintiff in error v. *The State of Georgia*, [*ante*, p. 442.] as a controlling authority on the points before us—a case argued and decided with ability, and in which nearly all the cases referred to were cited. Contenting myself with this reference, I proceed to the few other observations I deem it essential to make.

"It seems hardly necessary to observe that evidence of the character and habits of the party slain, is proper only so far as they can be supposed to have affected the intention of the slayer, in the fatal act. And, therefore, his general bad character is inadmissible. The evidence should be confined to a character and habits of violence, treachery, etc., such as might beget reasonable apprehensions of grievous bodily harm, and reduce the other party to the apparent necessity to slay in self-preservation.

"Such an apprehension may be, also, created by particular preceding acts, reasonably connected in point of time, or occasion, with the fatal encounter; or by threats, as well as by the general habits or conduct of the deceased; and may, therefore, be the proper subjects of evidence.

"But whether the general character, or conduct, or particular acts of the description mentioned, be offered, it appears to be essential to their reception, that it should, somehow, reasonably appear that the prisoner knew, or may be supposed to have known, such character or conduct; for, if he was ignorant of them, they could not possibly have modified his intention in the act of slaying.

"And, of course, if the relevancy of the testimony does not appear from the prior evidence in the case, the party offering it must lay a foundation for its reception in the proof of facts making it relevant, and the Court must, necessarily, have the power to decide, subject to review upon its relevancy.

"We are all of opinion that the Circuit Court was in error in rejecting the testimony proposed, which the circumstances showed to be proper; and, therefore, as it should have gone before the jury, however trivial its effects might have been, (of which we are not the judges,) we feel constrained to grant the motion for a new trial; and it is so ordered."

We shall now proceed to examine what seems to us the most singular ruling to be met with in the books. We allude to the case of *Fields v. The State*, 47 Ala., 603, which we have already quoted, *ante*, p. 593. This case was determined in the Supreme Court of Alabama, at its January Term, 1872. The defendant had been convicted of murder in the second degree, and sentenced to the penitentiary for ten years. In order that we may not seem to do injustice to the Court, it will be proper to state, that the defendant had sued out an attachment against the sister of the deceased; and that a little after midday on the day of the killing, the defendant and deceased met at the house of a neighbor; where the deceased, who was a powerful man, commenced cursing and abusing defendant; called him a gin-house-burning, thieving son of a bitch, twisted his nose, slapped him in the face with his hat, collared him, pulled him off the steps where he was sitting, and otherwise endeavored to provoke a difficulty with him. During a part of this time, a nephew of the deceased stood by with a pistol drawn. The defendant made no resistance; said he did not want to fight. After this difficulty defendant went home, got his gun, discharged the old loads, re-loaded both barrels with buckshot, remarking that he would kill the damned rascal before morning. About sunset, the deceased, returning home on horse-back, was shot from his horse by defendant, opposite defendant's gate. There appears to have been no combat, nor threatening demonstrations on the part of the deceased; but defendant stopped deceased in the road, accused him of calling him (defendant) a gin-house-burner, and shot him; and afterwards remarked, that he had shot the damned devil, and would kill any man that would accuse him of burning his gin-house or that would call him a thief. It thus appears to have been a case of deliberate and predetermined killing, characterized by express malice, done with a weapon prepared for the purpose, and possessing all the proper ingredients of murder in the first degree.

The defendant asked several witnesses, some upon cross-examination, and some introduced by himself, whether they were acquainted with the general character of the deceased, for turbulence, violence, bloodshed and recklessness of human life. But the Court, on objection, refused to permit this question to be answered, and the defendant excepted. The Court also refused to allow the defendant to ask the State's witness the same question, with the additional enquiry, if he, "witness, had, before the shooting, communicated to the prisoner any instance of the exercise of such character by deceased." The bill of exceptions does not show the purpose for which the defendant proposed to make the proposed proof, nor the ground on which the Solicitor for the State objected.

PECK, Ch. J.: "Was the evidence offered by the defendant, that the general character of the deceased was that of a violent, turbulent, revengeful, blood-thirsty, dangerous man, and reckless of human life, properly excluded by the Court? I feel constrained to answer this question in the negative.

"By the common law, the jury determined merely the guilt or innocence of the prisoner; and, if their verdict was guilty, their duties were at an end. They had nothing whatever to say as to the punishment to be inflicted. The court alone determined what the punishment should be, its extent and its severity; with that the jury had nothing to do. Their

whole duty was discharged when the verdict of guilty was pronounced.

“The common law on this subject has been greatly changed by our statutes, and the duties and responsibilities of juries largely increased. Consequently, evidence that would have been irrelevant and impertinent at the common law, becomes proper and necessary under our statutes, to enable juries to discharge their newly imposed duties rightly and properly.

“By our statutes, the crime of murder is made one of degrees, divided into murder in the first and second degree. Rev. Code, § 3653. Section 3654, Revised Code, enacts that ‘any person who is guilty of murder in the first degree, must, on conviction, suffer death, or imprisonment in the penitentiary for life, *at the discretion of the jury*; and any person who is guilty of murder in the second degree, must, on conviction, be imprisoned in the penitentiary, or sentenced to hard labor for the county, for not less than ten years, *at the discretion of the jury*.’ Section 3657 provides, that ‘when the jury find the defendant guilty, under an indictment for murder, they must ascertain by their verdict whether it is murder in the first or second degree; but, if the defendant, on arraignment, confesses his guilt, the Court must proceed to determine the degree of the crime, by the verdict of a jury, and pass sentence accordingly.’

“Here, we see that the degree of the crime must be determined by the verdict of a jury, upon an examination of testimony, and the punishment to be inflicted upon the defendant rests in the discretion of the jury. If the crime be murder in the first degree, the jury must determine whether the punishment shall be death, or imprisonment in the penitentiary for life. If in the second degree, the defendant must be imprisoned in the penitentiary, or be sentenced to hard labor for the county, for not less than ten years, *at the discretion of the jury*. Testimony is as necessary and important, to enable the jury to exercise this discretion prudently and properly, as to enable them to determine the guilt or innocence of the defendant. The jury have two important duties to perform, and both are to be governed and controlled by the evidence, and neither can be wisely or rightly discharged without evidence. As these duties are different, the evidence must necessarily be different. After the guilt of the defendant is settled, the proper evidence to determine *the degree of his crime*, and what should be the *extent and severity of his punishment*, must, in a great measure, depend upon a careful examination of the circumstances, not those only immediately attending the killing, but those also which may reasonably be supposed to have led to it; *and these circumstances should be considered in connection with the good or bad character, both of the defendant and the deceased*. Who is prepared to say that the punishment should be the same where a turbulent, revengeful, bloodthirsty, dangerous man, reckless of human life, has been slain, who had recently, only a few hours before, violated and outraged the person of his slayer, as though the party slain had been a man of good character, and peaceable disposition? For myself, I cannot conscientiously say so. Although the violence and outrage committed upon the person of the defendant, in this case, might not have been sufficient to reduce the offence from murder to manslaughter, yet we hold it was clearly proper for the consideration of the jury in determining the turpitude of the crime, and what should be the measure of the punishment to be inflicted. If the evidence of the general bad character of

the deceased was proper only in the latter case, it should have been received, and not excluded by the Court."

It has been hitherto supposed, in countries governed by the common law, that it is as much a crime to kill a bad man as a good one. It has been supposed that the law throws its protecting arm around every person being in the peace of the King or of the State, "man, woman, child, subject born or alien"; persons outlawed or otherwise attainted of treason, felony or premunire; Christian, Jew, Heathen, Turk, or other infidel." 3 Inst. 50. And whether he be a citizen or an alien enemy. *State v. Gut. ante*, p. 155, note. Or a member of a hostile tribe of Indians. *Ibid.*; Robertson's case, *ante*, p. 152. Or a free negro; for the law makes no distinctions in its principles in respect of color. *Campbell v. the People*, 16 Ill., 20. Our Declaration of Independence declares that all men are created equal, and endowed by their Creator with certain inalienable rights, among which are *life*, liberty and the pursuit of happiness; which must clearly be understood to mean that all men are created with the equal right to live, to enjoy liberty and to pursue happiness. And it is probable that no book on the criminal law has ever been written since the time of Lord Coke, either in England or in the United States, which does not distinctly lay down the principle, that all men, not actually engaged in hostilities against the State, stand on an equal footing in the eyes of the law, in respect of the right to live; and that, except in the actual exercise of war, it is as much murder deliberately to kill one man as another. This principle is brought out in nearly every one of the preceding cases, where the propriety of admitting evidence of the character of the deceased is considered.

But here is a case in which this principle is distinctly repudiated; and in which it is decided that, in trials for homicide, evidence of the violent and turbulent character of the person slain is admissible, without reference to the circumstances attending the killing, and for two purposes: 1, to reduce the degree of the crime; 2, to mitigate the *quantum* of the punishment. In other words, we are told as distinctly as we can be, without the employment of the express language, that it is less a crime, and deserving of a milder punishment, to kill a turbulent and violent man, than it is to kill one who is peaceable and orderly. We do not speak of the danger of imposition upon ignorant juries which such a principle lets in. This is a question of policy, and we prefer to consider the question only as one of right. Precisely, then, to the extent to which this principle is admitted, a private individual is permitted to sit in judgment upon the *general* bad character of his neighbor, with reference to a particular trait, and to take upon himself the vindication of the law against his neighbor because of such general bad character; nay, more than the law itself undertakes to do; for the law generally confines its penalties to particular acts of crime.

We expressed the opinion on p. 475, *ante*, before we had seen this case, that, in trials for homicide, evidence of recent threats, quarrels, etc., not of a character sufficient to reduce the *degree* of the crime, ought, nevertheless to be heard, as an ingredient to be considered in fixing the *quantum* of the punishment. We still adhere to that view, although it is put forward as a matter of speculation merely. We also think that the case we are now considering, was a proper one for the application of this principle. Here, evidence was admitted that, a few hours before the killing, the defendant

had assaulted and grossly abused the deceased. We think that, in addition to the admitting of this testimony, the jury should have been instructed that, although if they should find that there had been time for passion to subside and the blood to cool, such abuse would not reduce the *degree* of the homicide to manslaughter, yet they might consider it in determining the *quantum* of the punishment, in case they should find the defendant guilty of murder in either of its degrees. But, when we threw out the suggestion above alluded to, we never expected to find a case in which it would be determined that evidence of the general character of the person slain, with respect to turbulence and violence, is admissible for a like purpose.

Nor do we perceive any force whatever in the conclusion of the learned Judge, that evidence which would be irrelevant and impertinent at common law, is proper under the Alabama Code, because this statute lodges with the jury the discretionary power to determine the *quantum* of punishment, which is lodged with the Judge at common law. Because, whether this discretion be lodged with the jury or the Judge, it is equally necessary that proper evidence should be heard to guide and direct its wise and conscientious exercise; and evidence that would be proper to be heard by the jury in the one case, would be equally proper to be heard by the Judge in the other.

No one, it is conceived, can read the foregoing cases and doubt that cases frequently arise, in trials for homicide, where evidence of the violent and turbulent character of the defendant ought to be heard; but we do not recollect any instance where it has been contended that such evidence ought to be heard in every case, except in the dissenting opinion of BATTLE, J., in Barfield's case, *ante*, p. 625. But, according to the case under consideration, such evidence is admissible in all cases, without reference to the other facts in evidence; although (as in the particular case itself) the killing may have been upon an occasion produced by the slayer, or, although it may have been upon a lying in wait, or by poison; for the principle once admitted that it is less a crime to kill a bad man than a good one, there can be no logical exception made to it, growing out of the circumstances of the killing; nor does this decision undertake to make any. We conceive that such a doctrine can never obtain a foothold in a country where the principles of the common law exist.

The ruling in this case becomes less defensible when it is seen that the jury assessed the defendant's punishment at the lowest term allowed by law for murder in the second degree, and the proposed evidence, if admitted, could not possibly, in connection with the other facts proved, have reduced the homicide to manslaughter. It does not appear that the deceased had threatened the defendant's life, at this or any other time, or that he was in a position to carry out such threats, if made, or that he had sought the fatal meeting, or unnecessarily placed himself in the defendant's way, or that the defendant was in any danger at the time. On the contrary, while passing the defendant's house, on his way home at night-fall, he was arrested by the defendant and shot down with a weapon prepared for the occasion, and with every circumstance of deliberation and express malice. It is true there had been, five or six hours before, a great provocation; but there had been abundant time for passion to subside, and reason to resume

her sway. The killing, under the circumstances, then, was deliberate murder, and would have been no less so, had the character of the deceased been as blood-thirsty as that of a Mexican bandit. Under such rulings, the administration of justice becomes a farce and a mockery; and human life will become very cheap in Alabama, if such doctrines are upheld.

We are tempted here to make a suggestion. The practice of the criminal and civil departments of the law, is becoming of late years separated into two distinct branches. We know of criminal lawyers of considerable standing, who never have had a civil case in court. On the other hand, there are many lawyers who have attained eminence in their profession, who have never appeared as counsel in a criminal case, and to whom the criminal law is almost a sealed book. Under the system of electing judges which obtains in many of the United States, judges are chosen hap-hazard by political caucuses, from men of standing or reputation as lawyers, without reference to their special qualifications for the positions they are called upon to fill. It thus not unfrequently happens that judges are found, even in courts of last resort, who are unacquainted with the criminal law, except in a general way, and through their early reading. We know of one instance where a court of last resort was composed of three able judges, not one of whom was in a tolerable degree conversant with the criminal law. That such a court, however able, conscientious and laborious its members may be, should at times render crude and erratic decisions in criminal cases, is no more than is to be expected; and there seems to be no safeguard against a recurrence of the evil, unless some better mode can be devised for the selection of judges, or unless political caucuses can be so educated as to distribute their favors in such a manner as to place upon each bench of last resort at least one good criminal lawyer. We expressly disclaim applying these observations to the respectable Court which decided the case we have just examined.

The foregoing cases, and others which are included in this volume, do not leave much room to doubt that in proper cases, evidence of the character of the deceased for violence, in trials for homicide, ought to be admitted. What circumstances are appropriate for the admittance of such testimony, must, in a great measure, depend upon the circumstances of each particular case. It is thought that the following rules, however, are founded on sound principle, and well supported by the reasoning of the preceding cases: Such evidence ought to be admitted—

1. Where the evidence is wholly circumstantial, and the character of the transaction is in doubt; as in Tackett's case, *ante*, p. 615.

2. Where there is evidence tending to show that the killing may have been done from a principle of self-preservation. There is a plain matter of sense underlying this branch of the question. Where one is attacked or drawn into a combat, he is obliged by the constitution of his nature, in estimating the danger in which he is placed, and the degree and kind of resistance necessary to his defence, to consider not only the size and strength of his antagonist, the manner in which he is armed, and the threats which he has made, but also his character for recklessness, cruelty, revenge, and resolution. Now, the object of a jury trial, in such cases, is, or ought to be, to place each member of the jury precisely in the situation

in which the defendant was placed ; to surround him with the same appearances of danger ; to give him the same degree of knowledge of his antagonist's probable purposes which the defendant possessed, and no more ; and then to require him to say, under the obligation of his oath, whether the defendant did any more than a reasonable man should have done under the circumstances. We think that, in this view, the cases above quoted from Massachusetts, were appropriate ones for the admittance of such testimony ; and in York's case in particular, we humbly conceive that the Court did not, and could not, answer the argument of Mr. Dana, in support of the admission of the testimony proposed. The ruling in Mead's case, excluding evidence of the size and strength of the deceased, is not only, we venture to suggest, clearly repugnant to reason, but contrary to every other case we have met with, in Massachusetts and elsewhere, where that question has been raised. See, for instance, Selfridge's case, *ante*, p. 23 ; Copeland's case, *ante*, p. 41 ; Thompson's case, *ante*, p. 92 ; Benham's case, *ante*, p. 115 ; Riley and Stewart's case, *ante*, pp. 156, 157 ; Floyd v. State, 36 Ga., 91. We believe it is the universal practice to admit such testimony, where the killing was done in combat, and do not recollect having met with any other case where it was excluded. Such evidence is admissible *against* the prisoner, as well as for him. Hinch v. State, 25 Ga., 699. Of course, in this view of the case, and for this purpose, evidence of the character for violence of the deceased would be inadmissible, unless *known* to the defendant ; but when such character is proved by general reputation in the neighborhood where the deceased and the defendant both lived, it would seem that it ought to be *presumed* that the defendant knew it. Such knowledge in many cases could only be established by presumptive evidence. We confess that the remark of Chief Justice DAVIES, in Lamb's case, *supra*, pp. 653, 654, that a man in such cases ought to be required to prove affirmatively the character of his own wife, does not appear to us to be of much force. The fact that she was his wife, and that they had cohabited together, would of itself be presumptive proof that he knew her character, and, perhaps, the only proof, certainly the most satisfactory and convincing, that could be presented.

3. Wherever it is proper to admit threats, either communicated or uncommunicated, made by the deceased or prosecutor against the defendant, evidence of the character of the defendant for violence, firmness of purpose, and the like, is equally admissible. This principle has been declared in Texas by Statute. See syllabus of Pridgen's case, *ante*, p. 417. The reason of this rule will appear from the argument of Chief Justice PEARSON, in Bottoms v Kent, *supra*, p. 673, namely, that where threats have been made, the character of the person making them is the principal element to be considered in determining their value. If this view be correct, the conclusion reached in Lombard's case, *supra*, pp. 681-2, is untenable.

The American books contain other cases on the subject under consideration. Such of these as we have found, we shall merely cite in the index ; where we shall also endeavor to show the effect of all the cases in this volume which relate to the subject.

E.—DEFENCE AGAINST UNLAWFUL ARREST.

NOLES v. THE STATE.

[26 ALA., 31.]

*Supreme Court of Alabama, January Term, 1855.*WILLIAM P. CHILTON, *Chief Justice.*GEORGE GOLDTHWAITE, } *Associate Justices.*
SAMUEL F. RICE**DEFENCE AGAINST UNLAWFUL ARREST.—ACTING UPON APPEARANCES OF DANGER.**

1. To excuse a homicide, there must exist, on the part of the slayer, an actual necessity to kill in order to prevent the commission of a felony or great bodily harm, or a reasonable belief in his mind that such necessity exists. [Acc Sloan's case, *ante*, p. 517, 6th res., and cases cited.]

2. While every citizen has the right to resist any attempt to put an illegal restraint upon his liberty, his resistance must not be in enormous disproportion to the injury threatened. He has no right to kill, to prevent a mere trespass which is unaccompanied by any imminent danger of great bodily harm or felony, and which does not produce in his mind a reasonable belief of such danger. [See note following next case.]

3. The charges of the Court in this case, and its refusal to give the charges asked by the prisoner, tested by these principles, and held correct.

4. Any fact which tends to prove the real motive of the prisoner in killing the deceased, or the purpose of the deceased in going to the prisoner's house, or that the prisoner knew, at the time of the killing, that the deceased and his companions did not intend to commit any felony, nor to do him any great bodily harm, is relevant evidence; as that an affidavit for the arrest of the accused had been sworn out before a justice and the deceased deputed to execute it. [So, evidence tending to show a state of facts the converse of the above, is admissible in behalf of the accused. Goodrich's case, *ante*, p. 532; Monroe's case, *ante*, p. 442; Keener's case, *ante*, p. 539; Pridgen's case, *ante*, p. 416; Campbell's case, *ante*, p. 282; Rapp's case, *ante*, p. 293; and others.]

Joseph Noles was indicted, at the spring term, 1853, for

the murder of one George T. Sharp; was tried, convicted and sentenced to be hung, but the judgment was reversed at the June term, 1854, of the Supreme Court, and the cause remanded. See 24 Ala., 672. A second trial was had at the fall term, 1854, which resulted in another conviction, from which this writ of error is prosecuted.

Burns, a justice of the peace, was permitted to testify that Noles' wife had made an affidavit against him, and that he thereupon issued a warrant for Noles' arrest. It is to be observed in the outset, that the circuit judge violated a plain rule of evidence and of common sense in excluding this affidavit and warrant from the jury, and afterwards in charging them as though no such warrant had been issued. We are, hence, left in doubt as to the nature of the charge contained in the affidavit, but it would seem from the charge of the circuit judge, that it was a misdemeanor only. Burns read to the prisoner the affidavit which his wife had made against him, and the prisoner demanded an investigation. Burns told the prisoner that he had no constable or officer to arrest him, and that he would not try him unless he was regularly arrested, but if he would surrender himself to some one, he, Burns, would investigate it. Noles replied that he would see about it, and then left. This testimony the judge admitted against the objection of the prisoner, after excluding the affidavit and warrant which had been offered by the State.

Burns then appointed Sharp, the deceased, a special constable to arrest Noles, there being no regular constable in the beat, *and gave him the paper which he had issued.* Sharp then summoned a posse of seven or eight men, and started for Noles' house. When they had arrived within forty or fifty yards of the house, Noles came out into the yard with his gun, and ordered them to stand off; said that if they abused him, he would shoot some of them; that they were a drunken, rowdy set, and if they would go away, and send some old man, he would go with him, or if they would send a ten-year-old-boy, he would go with him. The party halted, and Sharp

told Noles not to shoot; that they would not rush upon him, but that he would return in the evening and arrest him; and Noles replied that he would be at home. The party were quiet and orderly, and were unarmed.

Sharp returned to Burnsville, the place where the justice lived; summoned two additional men older than the others; got a double-barreled shot-gun, and started back with his posse to arrest Noles. When the party had arrived within sixty or seventy yards of Noles' house, Noles came out into the yard and ordered them to stop, raising his gun to his face, and saying if they advanced, he would shoot some of them. They all stopped, and Sharp dismounted quickly on the left side of his horse, holding the gun in an elevated position, it being grasped about mid-way in his left hand. As soon as Sharp was on the ground, and fairly erect, Noles' gun fired, the ball hitting Sharp, who died in ten minutes. Noles fled. Hall, one of the posse, when he observed that Noles was about to shoot, called out to Sharp, "He is about to shoot," or "We are about to catch it." A single witness testified that the language used by Hall, was "Shoot, he is about to shoot us;" but Hall did not recollect using such language, nor did any other member of the posse, except the witness mentioned, hear such language. After Sharp fell, his gun was found near him, the right hammer down, and the cap either off or burst; but the gun was not examined to see whether a barrel was discharged. One member of the posse heard two reports, but thought that one was from the echo of the house. It was admitted by the State, that Mrs. Barrett, if present, would swear that she heard two distinct reports, between a quarter and a half mile from the place, and at the time Sharp was shot. A medical witness testified, that, from the direction of the ball, the left arm of Sharp must have been raised horizontally at the time he was shot. A witness testified that Hall, one of the elderly men that Sharp had added to his party, said that when they went to Noles' house, they did not want to take him, but wanted him to go away.

His Honor, among other things charged the jury:

1. "That Sharp and his party, in going to the house of Noles to arrest him, not having any warrant to do so, and no charge of felony against him, were all trespassers, and that the prisoner had the right so to consider them, and to treat them as such.

2. "But notwithstanding this, if neither Sharp nor his company intended to commit any felony against Noles, (as by killing him, or doing him great bodily harm, stealing his goods, or burning his house, or the like,) and that neither Sharp, nor any of his company said or did anything which might induce Noles to apprehend that they intended to commit a felony, or such things as are above referred to,—then Noles could not justify killing Sharp, but would be guilty, at least, of manslaughter, and of murder if the killing was of malice, as the Court will hereafter explain.

3. "That the law regarded the liberty of the citizen as sacred, and every arrest of a citizen without warrant (where no felony actually committed was charged, and where the arrest was not to prevent the commission of a felony) was a trespass, and such arrest was unlawful; that such unlawful arrest was, in law, a great provocation, sufficient to excite and heat the blood of the party arrested; and that, if, under such heat and excitement, the party about to be arrested, to prevent it, kills the trespasser, it would be only manslaughter.

4. "But, if, in this particular case, the prisoner knew and believed that Sharp and his party only intended to arrest him, and carry him before Esq. Burns to answer the complaint to keep the peace, and to prevent this he killed Sharp, with what the law calls malice, as already explained to the jury,—then he would be guilty of murder, *notwithstanding the unlawfulness of the arresting [party] so intending to carry him before Justice Burns.*"

The prisoner excepted to the charges of the Court, and wrote out and asked the following charges:

1. "If the deceased and his company went to the prisoner's house in order to arrest him, having no warrant or authority to do so, then they were all trespassers, and the prisoner was not bound to submit to their arrest, and in forbidding their approach, he did no more than he had a right to do; and if the company, or any of them refused to stop, but still advanced, intending to arrest him, and he could only prevent the arrest by taking up and presenting his gun at the parties so advancing, he had the right to do so; and, if, when he so presented his gun, still forbidding their approach, one of the party called out to Sharp to shoot the prisoner,—if Sharp had a gun and dismounted immediately, and did then any act or acts calculated reasonably to satisfy the prisoner that he was then in danger of being immediately shot by Sharp,—then it was lawful for the prisoner to shoot, and if he killed Sharp, it was neither murder nor manslaughter, and the prisoner was entitled to an acquittal." This charge the Court gave.

2. "That the person of every free white man is sacred in law, and every arrest or attempt to arrest him, without warrant or other legal authority, is a violation of his rights, to which he is not bound to submit, and if he can only prevent such unlawful arrest by taking the life of the aggressor, he has a right to do so; therefore, if Sharp and his company, having no warrant or other legal authority to arrest the prisoner, went to his house, intending to arrest him, and then and there attempted to arrest him, and such arrest could only be prevented by taking the life of Sharp, then the prisoner is entitled to an acquittal." This charge the Court refused, and the prisoner excepted.

3. "If Sharp and his company went to the prisoner's house to arrest him, without warrant or other legal authority, the prisoner was not bound to submit to that arrest, nor was it necessary for him to fear or believe that Sharp and his company intended to commit a felony, nor to commit such violence on his person as to pro-

duce to him great bodily harm ; but, in order to preserve, protect and defend his liberty, he had a right to resist and prevent this unlawful arrest, and if, while doing so, Sharp and his party still persisted in their determination and attempt to arrest the prisoner, then the killing of Sharp is not more than manslaughter at the most ; and if the arrest of the prisoner could not be prevented otherwise than by killing Sharp, then such killing is neither murder nor manslaughter, and the prisoner should be acquitted." This charge, as a whole, the Court refused, and the prisoner excepted.

4. "If Sharp and his company went to the prisoner's house, intending to arrest him on any charge not amounting to felony, and the prisoner had fled, or refused to submit to the arrest; then, if Sharp and his company could not arrest him without taking his life, and the prisoner had been killed by Sharp,—then such killing would have been murder in Sharp and his company so consenting to the same." This charge the Court gave.

[The fifth charge requested is not stated in the record.]

6. "When a man acts under a necessity, malice is not implied from such acts, but such acts are referred to the necessity under which he acts." This charge the Court gave as asked.

All the matters covered by the exceptions above stated, together with the judgment rendered on the verdict, are now assigned for error.

Thos. Williams and *Geo. W. Gayle*, for plaintiff in error ; *M. A. Baldwin*, Attorney-General, for the State.

RICE, J., delivered the opinion of the Court:

To excuse one individual for taking the life of another, there must exist a necessity to prevent the commission of a felony or great bodily harm, or a reasonable belief in the mind of the slayer that such necessity does exist. If there is neither the existence of such necessity,

nor any reasonable belief of its existence, the law will not acquit the slayer of all guilt. *Oliver v. The State*,^a 17 Ala., 587; *Pritchett v. The State*,^b 22 Ib., 39.

The case of a mere trespass upon the person and liberty of the slayer, which created no reasonable belief in his mind that any of the trespassers would commit any felony or do him any great bodily harm, cannot be allowed to constitute an exception to the foregoing rules. When such trespass is threatened or committed, he has no *right* to kill, unless the unlawful act, when properly and lawfully resisted by him, is persisted in by the trespasser, until it ultimately results either in an actual necessity, on his part, to kill, in order to prevent the commission of a felony, or great bodily harm, or in the reasonable belief by him of the existence of such necessity. *Carroll v. The State*,^c 23 Ala., 28; *State v. Craton*, 6 Ired., 164.

Believing the foregoing legal propositions to be correct, and being bound to construe the charges and refusals to charge in connection with the evidence, we cannot do otherwise than declare, that there is no error in the charges given, nor in the refusals to charge as requested, of which the prisoner has any right to complain.

We admit the right of any citizen to resist any attempt to put any illegal restraint upon his liberty. But his resistance must not be in enormous disproportion to the injury threatened. He has no right to kill to prevent a mere trespass, which is unaccompanied by any imminent danger of great bodily harm or felony, and which does not produce in his mind any reasonable belief of such danger. We cannot sanction the charges asked by the prisoner and refused by the Court, to the full extent to which they go.

Any fact which tended to prove what was the real motive of the prisoner for killing the deceased, or the purpose of the deceased in going to the house of the prisoner, or which tended to prove that at the time of the killing, the prisoner knew that the deceased and his companions

^a *Post.* ^b *Ante*, p. 635. ^c *Post.*

did not intend to commit any felony, or do him any great bodily harm, was relevant in evidence. In this point of view, the evidence excepted to by the prisoner was admissible.

The prisoner did not object to this evidence on the ground that the affidavit and warrant were not produced; they had just been offered by the State, and been excluded on the objection of the prisoner. The only question raised by the objection was as to the relevancy of the evidence as offered; and as it was relevant, there was no error in overruling the objection. If the prisoner had objected on the ground that the affidavit itself, and warrant were not produced, and the affidavit and warrant had not then been produced, we would have been called on to decide whether such an objection should have been sustained. But, as it is not presented in that way, we do not intimate an opinion on that question. *Allen v. Smith*, 22 Ala., 416.

* * * * *

We are fully convinced that there is no error against the prisoner, in any of the proceedings, which authorize a reversal of the judgment and sentence pronounced by the Circuit Court of Dallas county; and we affirm said judgment and sentence, and direct said sentence to be carried into execution.

Judgment affirmed.

COMMONWEALTH v. DREW.

[4 MASS., 391.]

*Supreme Judicial Court of Massachusetts, Cumberland,
May Term, 1808.*

THEOPHILUS PARSONS,	} <i>Justices.</i>
SAMUEL SEWALL,	
GEORGE THATCHER,	

RESISTANCE OF UNLAWFUL ARREST—RESISTANCE OF TRESPASSER—DEFENDING ANOTHER PERSON.

1. A bare trespass against the property of another, not his dwelling-house, is not a sufficient provocation to warrant the owner in using a deadly weapon in its defence; and, if he do, and with it kill the trespasser, it will be murder. But if the beating be with an instrument, and in a manner not likely to kill, it will be no more than manslaughter. [Acc. Harrison's case, *ante*, p. 71, and citations.]

2. If one under color or claim of legal authority, unlawfully arrest, or actually attempt, or offer to arrest another, and this latter, in his resistance, kill the aggressor, it will be no more than manslaughter. [See note, *sub fin.*]

3. In such case, if one, not a stranger, aid the injured party by endeavoring to rescue him, or to prevent an unlawful arrest when actually attempted, and, in so doing, kill the aggressor, it will be no more than manslaughter. [See upon this point, note, *sub fin.*]

The defendants were indicted at this term for the wilful murder of Ebenezer Parker. The indictment contained two counts. The first count charged Drew and Quinby with assaulting Parker at Falmouth, on the 11th day of January last, then a deputy sheriff, and in the due execution of his office; and that Drew then and there, gave the deceased the mortal wound, of which he thereafterwards, on the 18th of the same January, died; and that Quinby was present, aiding and abetting Drew in giving the mortal wound.

The second count was like the first, with this difference

only, that it was not alleged therein that Parker was a deputy sheriff, in the execution of his office.

The prisoners, on their arraignment, pleaded not guilty; and not agreeing in their challenges to the jurors, they were separately tried. Drew was first put on his trial. It satisfactorily appeared in evidence, that, on the day alleged in the indictment, Drew gave the deceased a mortal wound with a bludgeon, by which Parker's skull was fractured; that the bludgeon was of hard wood, about four or five feet in length, and about two inches in diameter, having formerly been used as a handle to a pitchfork; and that Parker, seven days afterwards, died of that wound.

It was proved that at the time the wound was given, and long before, the deceased was, and had been, a deputy sheriff, duly appointed and qualified to execute that office; that an execution, duly issued on a judgment legally recovered by one Josiah Gould against Quinby, had been, some time before the assault, delivered to the deceased to be executed; that, about a fortnight before the assault, the deceased had lawfully arrested Quinby on that execution, and had delivered him to one Richard King for safe keeping, who took charge of him; that, without the knowledge of the deceased, King, at Quinby's request, permitted him to go at large, Quinby promising King that he would be ready to settle the execution at any time when the deceased should call on him; that Parker, who lived at several miles' distance from Quinby's place of residence, came thither, about a week afterwards, to see Quinby, and procure satisfaction of the execution, but Quinby could not be found by him; that Drew and Quinby were hired men, in the service of Daniel Conant, Drew's employment being at a blacksmith's forge of Conant's, and Quinby's in working at Conant's saw-mill; but when the mill was not going, Quinby worked with Drew at the blacksmith's shop, which was at a distance from, and not part of, any dwelling-house; that, on the day when the mortal wound was given, the deceased again came to see Quinby, and,

if he would not satisfy the execution, to arrest his body ; that Quinby knew that the deceased had come with that intent, and being at work in the saw-mill, and seeing the deceased coming to the mill, he left his work and went to Conant's house ; there taking with him a bottle of rum, he passed out of Conant's back door, and went to the blacksmith's shop, where Drew was at work, making nails, when Drew and Quinby fastened the door, to exclude the entrance of any person ; that in the evening, the deceased, having been informed that Quinby had shut himself in the shop with Drew, sent one William Babb, Jr., to the shop, to inform them that he was coming, and to advise Quinby to settle the execution ; that Babb went, and finding the door fastened, knocked ; Quinby called, " Who is there ? " Babb then told his name. " Who is with you ? " asked Quinby ; upon Babb's answering, " No one," he was admitted into the shop, and the door was again fastened, and Babb delivered his message from the deceased, advised Quinby to settle the execution, and told him that Conant was ready to settle it for him, if he would consent ; but Quinby refused, and said it should not be settled that night ; that the deceased then came to the shop with Richard King, Samuel Cox, and some others to assist him, and knocked at the door ; Drew was drawing nails from a rod then in his hand, and Quinby was blowing the bellows, one hand being on the bellows-pole, and the other resting on the bludgeon, with which the mortal wound was afterwards given ; that when the deceased had knocked, Drew enquired who was there ? " Parker," answered the deceased ; that Drew then threw some burning cinders towards the door from the nail rod in his hand ; that Parker then asked for admission, and Drew asked him if he was well ; " Yes," answered Parker. " Then I advise you," said Drew, " to stay where you are ; " that the deceased then told Drew, that he did not want him, that he wanted Quinby, who was his prisoner, and that he would have him ; that the deceased then put his hands under the door, which was

about four feet wide, and which opened outwards on a lane leading to Conant's house, and to his mills, and, without much apparent difficulty, pulled it open; that Drew immediately threw down the nail-rod, caught up a sledge, and came to the door; that he went out in a great passion, saying, "What are you breaking open my shop for? stand by, or I will throw the sledge through you;" that he then, with the sledge, struck at the deceased, who was without any weapon, and who dodged behind the door; that he then struck at King, who retreated from the sledge, and Drew threw in at him, and it glanced against his breast, and fell without hurting him; that Quinby, when Drew had left the shop with the sledge in his hand, threw down the bludgeon he had held, towards the door; and it fell about two feet distant from it; that Drew, after throwing the sledge at King, returned to the shop-door, and saw the bludgeon lying there; that he reached in his hand, and took the bludgeon, and turned to the deceased, who had pushed the door partly forward, had come from behind it, and was standing against the edge of it, and struck at him three times with the bludgeon, holding it in both his hands, and striking with great violence; that the first blow fell on the edge of the door, and forcibly shut it; the second blow was on the head of the deceased, and inflicted the mortal wound; and the deceased, when falling under the weight of it, received the third blow on his back or shoulders, it not being clearly ascertained on which; and one witness also testified that the first blow struck the head of the deceased; that Drew then turned to King, and with the bludgeon knocked him down, and immediately went into the shop, carrying the bludgeon with him, and then told Babb that he had better take Parker up, as he had got enough of it; that Babb left the shop to take up the deceased, and Drew and Quinby again fastened the door, and, opening the window, defied the people who were outside; Drew saying, that as many might come as had a mind to, and he would give them all sore heads.

Upon this evidence, the counsel for the prisoner argued, that the offence was manslaughter, and not murder. That Parker, having before arrested Quinby on the execution, and his servant having permitted him voluntarily to escape, he could not again lawfully arrest Quinby on the same execution; and therefore, the deceased was a trespasser in breaking open the shop-door, and his entry might lawfully be resisted by Drew, who was in possession of the shop. And they argued further, that the deceased was killed in attempting unlawfully to arrest Quinby, by color of a legal warrant; that the attempt was an unlawful act; that not only Quinby, but any stranger, might lawfully oppose the officer in his unlawful attempt, and *a fortiori*, might Drew, as he could not be considered as a stranger, being a fellow-servant with Quinby, working with him for Conant, who had hired them to labor in his service; and if the officer was killed in pursuing his unlawful attempt, the killing was, at most, but manslaughter. And upon this point, they cited, and relied on as authorities, Sir Henry Ferrer's case, Cro. Car., 371; Hopkin Huggett's case, 1 Hale, 465, and Kel., 59; Rex v. Tooley, *et al.*, 2 Ld. Raym., 1296; Mary Adey's case, 1 Leach C. C., 245; 1 East C. L., 329, in the note.

The Solicitor-General for the Commonwealth argued that when the mortal wound was received, the deceased had not given to Drew any provocation, sufficient, in law, to reduce the homicide below the crime of murder. And he cited Foster's C. L. Disc., 2, ch. 8, §§ 10, 11, 12, 13, 14; and 1 East's C. L. 325, ch. 5, § 89.

The CHIEF JUSTICE charged the jury. After stating to them the evidence, he observed that, if they believe the witnesses, the deceased, when he received the mortal wound, was not in the execution of his office, as a deputy sheriff; that, having arrested Quinby fourteen days before, and committed him to the custody of King, who had voluntarily permitted his prisoner to go at large, this permission must also be considered as the act of the deceased, whose servant King was; and that a vol-

untary escape of Quinby having been suffered, the deceased could not lawfully arrest him again on the same execution ; and, therefore, that the prisoner ought to be acquitted of the felony and murder charged in the first count of the indictment.

In the second count, the prisoner was charged with murdering the deceased, then in the peace of God, and of the commonwealth, without any allegation that he was in the execution of his office as a deputy sheriff; and the jury were instructed that it was their duty to consider the evidence, as it applied to this second count. If they believed the witnesses, there was no question but that the deceased was killed by the prisoner at the bar. If they were satisfied of this fact, the implication of malice would arise, unless the circumstances of the killing were such as would reduce the crime below murder. If the act of killing was in itself attended with probable dangerous consequences to the deceased, and was committed deliberately, the malice will be presumed, unless some sufficient excuse or provocation should be shown; for the law infers that the natural or probable effects of any act, deliberately done, were intended by the agent. It had been argued that there were two causes of provocation, which would reduce the killing below the crime of murder. One was, that the prisoner was in the peaceable possession of his shop, engaged in his lawful business, when the deceased unlawfully forced open the door, with an intent to enter, against the prisoner's consent. The other provocation was, that the deceased forced the door, with the intent unlawfully to enter, and to arrest Quinby, who was the prisoner's fellow-servant, and at work with him, the deceased having no legal warrant therefor.

The Chief Justice then observed that it was necessary for the jury, before they considered the nature and sufficiency of these provocations, to determine whether the bludgeon used by the prisoner, in killing the deceased, was, or was not, a deadly weapon, which would necessarily kill, or do great bodily harm; that this was a ques-

tion of fact for the jury exclusively to decide. If the jury were satisfied that the weapon used was not likely to kill, or to do great bodily harm, he was of opinion that either of the provocations was sufficient to free the prisoner from the guilt of murder. For, by using a weapon which would not probably do great injury to the deceased, it was a reasonable inference that the prisoner did not intend to kill the deceased, but accidentally killed him, against his intention, and the presumption of malice would be sufficiently rebutted; and without malice, the killing could not be murder. But if the jury were satisfied that the instrument of death was a deadly weapon, which would probably kill the deceased, or do him great bodily injury, these grounds of excuse or provocation would deserve a different consideration. That the provocation arising from the trespass committed by the deceased in breaking open the shop door, for the purpose of unlawfully entering, was not a provocation sufficient to reduce the killing below the crime of murder, if the prisoner killed the deceased with a deadly weapon; because the trespass was not a sufficient excuse for such a barbarous act, admitting the prisoner, and not Conant, his master, to have had possession of the shop. For it is a rule of law, that where the trespass is barely against the property of another, not his dwelling-house, it is not a provocation sufficient to warrant the owner in using a deadly weapon, and if he do, and with it kill the trespasser, this will be murder, because it is an act of violence beyond the degree of the provocation; but if the beating be with an instrument, and in a manner not likely to kill, and the trespasser should, notwithstanding, happen to be killed, it will be no more than manslaughter. The other provocation, which, it was argued, would reduce the killing below murder, was the forcibly breaking of the shop-door by the deceased, with the intent unlawfully to enter, and to arrest Quinby. It was a principle of the law, that, if any man, under color or claim of legal authority, unlawfully arrest, or actually attempt or offer to arrest another, and, if he resist, and

in the resistance, kill the aggressor, it will be manslaughter; and that any person aiding the injured party by endeavoring to rescue him, or to prevent an unlawful arrest when actually attempted, is guilty only of manslaughter, if he kill the aggressor in opposing him, unless, perhaps, the party aiding be a stranger to him, whom he shall endeavor to assist. That whether the principle will, or will not, comprehend a stranger, it was not necessary then to decide; for it was the opinion of the judges then present, that, in this case the prisoner was not to be considered as a stranger to Quinby, as they were fellow-servants, hired by the same master, and were at that time laboring together in his service.

Although, from the testimony of the witness, (if the jury credited him,) it appeared that, on the door being broken open, the prisoner rushed out with his sledge, saying, "What are you breaking open my shop for? Stand by, or I will throw the sledge through you," whence it may be inferred that the fatal blow was given to chastise the deceased for the violence done to his shop; yet the jury would decide, whether it must not be reasonably presumed that the intent of the prisoner was also to prevent the deceased from entering the shop to arrest Quinby, as the door had been fastened for his protection, and as the deceased had just before declared that he was his prisoner, and that he would have him. That in this view of the evidence, the jury would apply the facts to the law.

In three of the cases relied on for the prisoner, the unlawful arrest had been made before there was any resistance or quarrel. And in the last case, the officer and his assistant, before the latter was assaulted, were in the room with the party to be arrested, had him in their power, and had ordered him to go with them. In the case of the prisoner, Quinby had remained all the time in the shop, and the deceased had not entered it, but when the prisoner went out, had retreated behind the door, to avoid a blow from the sledge. That, before the mortal blow was given, a stroke with the bludgeon

had forcibly shut the door: and that the deceased and the prisoner were out of the shop, with the door closed, when the mortal wound was inflicted. If the jury were satisfied that the evidence established these facts, they would conclude that, although the deceased had forced open the door, with the intent to enter the shop, to arrest or to attempt the arrest of Quinby, yet when he received his death wound, he had not arrested Quinby, nor had he, in fact, attempted or offered to arrest him. The Chief Justice concluded by observing that he had considered the evidence in a light as favorable to the prisoner as was consistent with the testimony of the witnesses; and it was with regret that he was obliged to declare, that, if the facts were as he had stated them, of which the jury were the judges, the killing of the deceased by the prisoner, if the instrument was a deadly weapon, amounted to the crime of murder.

The jury acquitted the prisoner on the first count, and found him guilty of the felony and murder charged in the second count.

Verdict, guilty.

NOTE.—The above two cases sufficiently make clear the extent to which a person may go, in resisting an unlawful arrest. From them the following conclusions may be deduced expressive of the usual rule in such cases :

1. That an attempt unlawfully to arrest or restrain the liberty of a person, stands on much the same footing, as any other non-felonious assault, or as a common assault and battery. In neither case is the injury, in a legal sense, irreparable, as in case of a felony committed upon the person. For, in case of an illegal arrest, the law promises a writ of *habeas corpus* to discharge the person so arrested, and also damages for the false imprisonment. Therefore, the person defending against the illegal arrest, can no more justify the slaying of the person attempting the arrest, than he can justify the slaying of a person who attempts any other kind of non-felonious assault, or trespass upon his person. This point is, in effect, decided in the first of the two preceding cases; and it is a question about which there is no dispute. It results from the fact, that an unlawful arrest is a trespass merely, and not a felony. But, nevertheless, a person is not obliged to submit to an unlawful arrest, any more than to any other assault or trespass. He may stand his ground and repel force by force, taking care that the force employed does not exceed the bounds of mere defence and prevention, and that it does not become enormously disproportionate to the injury threatened. This is the law of non-felonious assaults, as we shall see by the case of Gallagher, next following, and as we have

already seen by the case of Thompson, *ante*, p. 92; of Benham, *ante*, p. 115; of Shippey, *ante*, p. 133; and others. And there is no reason why it should not apply to the case of an unlawful arrest, which is an assault of an aggravated character, as will be seen by the cases cited under the next head. Thus, it is said in a late case in Delaware: "If an officer comes without lawful authority to arrest a man in his own house, the party is not bound to yield, and may resist force with force; but he is not authorized to go beyond the line of resistance proportioned to the character of the assault, or he, in turn, becomes a wrong-doer." *The State v. Oliver*, 2 Houston, 606. And in such case, "it will be an unlawful killing; but unless there is malice, it will not be murder—it will be manslaughter only." *Ibid*.

And the Supreme Court of Texas, in a case where a constable was resisted in attempting to arrest a person to prevent a threatened breach of the peace, and the defendant was consequently indicted for an assault, reason as follows—stating precisely the law applicable to the resistance of other non-felonious attacks :

"But admitting that the defendant was not then doing anything, nor was about to do anything which justified the constable in arresting him, and that therefore he had a right to stand on his own defence, and prevent himself from being arrested by the constable, (who had no warrant,) or by any private person, the jury were still authorized to find him guilty of an assault, from the dangerous and unnecessary and improper means which he used to protect himself from the arrest. If the constable, without any lawful authority or just cause, had arrested him, it would have included an illegal assault, which he would have had a right to prevent instantly himself. But by what means? Could he do it by an assault with a deadly weapon? It is not shown that such extreme means were necessary or proper on that occasion. His antagonist had already been arrested, and it does not appear that the constable either had in possession or was attempting to procure or use any weapon of any sort in making the arrest. Our code provides that any one may protect himself from all unlawful assaults or other forcible injuries, and it also prescribes the manner in which he may do it. 'Where violence is permitted to effect a lawful purpose, only that degree of force must be used which is necessary to effect such purpose.' Penal Code, 484. 'The resistance which the person about to be injured may make to prevent the commission of the offence, must be proportioned to the injury about to be inflicted. It must be only such as is necessary to repel the aggression.' Code Crim. Pro., 69 and 70. This is in entire harmony with the spirit of the common law. Although a man has a right to bear arms of the most deadly character in his own defence, it does not therefore follow that he has a right to defend himself with them, and by using them on all occasions, however trivial the attempted infringement of his rights. Under ordinary circumstances he could have no right to use them to repel a slight assault or trespass. The serious character of the aggression alone can produce the necessity, and hence alone his right to make use of them in defending himself. The law does not permit the lives of individuals to be thus hazarded." *Stockton v. The State*, 25 Tex., 776.

This right to repel force by force continues until the person at-

tempting the unlawful arrest presses forward with so much force, that the person defending is obliged to choose between three things: to retreat, to surrender, or to kill his adversary. And here, as in other cases of non-felonious assault or mutual combat consequent thereupon, he is probably obliged to retreat, if he safely can, before he can justify killing. If he cannot disable his adversary without killing him, he must either surrender, retreat, or incur the guilt of manslaughter. We do not, however, recall any case where the doctrine of "retreating to the wall" has been applied to cases of combat arising in resistance of unlawful arrest. On the other hand, it was said, in a case where the officer and his party preceeded to unlawful extremities in firing into a man's house, while attempting to arrest him on a peace warrant, "Under this view of the case, the resistance of the prisoner to an unlawful attack, though such resistance should result in the death of the aggressor, could not amount to murder, but manslaughter only, or homicide in self-defence. The law of self-defence justifies the repelling of force by force in such cases, even unto death, but gives no protection to wanton or unnecessary aggression." *The State v. Oliver*, 2 Houston, (Del.,) 608.

a. We shall now state an exception, or rather a limit to this principle. In the foregoing paragraphs, we have been speaking only of ordinary cases of arrest by persons acting under color or claim of legal authority. Other cases which might be denominated arrests, but which partake rather of the character of felonious assaults, do not fall within the above principle; such as kidnapping a person for the purpose of selling him into slavery; or carrying him into a foreign country; or impressing him as a seaman on board a foreign ship; or an arrest by a vigilance committee. In such cases as these, a person would undoubtedly be justified in protecting his liberty, even unto the death. Mr. Bishop refers to a case of this kind when he says, "And if a case should arise, in which an attempt was made to convey a person by force beyond the reach of the laws, and there confine him perpetually, doubtless the courts would hold him justified legally, as every man would pronounce him to be morally justified, in resisting to the death. And this proposition would seem in legal reason, to extend to an attempt to convey the individual into another State or country." 1 Bish. Crim. Law, § 868, 5th ed. So, it has been said, referring to a case of ordinary arrest by a peace officer, that "circumstances of threatened difficulty with dangerous weapons in the hands of others, may surround a party so that it would be unsafe for him to suffer an unlawful arrest by a constable, which might place him at disadvantage with his antagonists by disarming him, and he might not be in a situation in his emergency to await the delay of a milder means of self-protection, In any such case the facts which constituted the emergency must be shown, to justify the immediate use of such deadly weapons." *Stockton v. The State*, 25 Tex., 777.

2. Again: "A lawful power to arrest may be exercised in such a wanton and unnecessary manner as to make the officer a trespasser, and justify resistance. * * * Thus, if an officer having a warrant to arrest a man for a crime or misdemeanor, finds him at his house, he may not break into the house until he has demanded admittance and been refused; he may not attack the house or the person within with violence, until he has been resisted and thus obliged to resort to violence; he may not fire

upon the house or the person within it, until he has been so fiercely resisted and opposed, as to make that kind of attack prudent and necessary; and if he does proceed to execute even lawful authority in this unlawful way, he justifies resistance." *The State v. Oliver*, 2 *Houston*, (Del.), 605, 606.

3. Although a man will not be *justified*, then, if he kill in defence against an illegal arrest of an ordinary character; yet, the law sets such a high value upon the liberty of the citizen, that an attempt to arrest him unlawfully is esteemed a great provocation, such as will reduce a killing in the resistance of such an arrest to manslaughter. This principle is declared in the second of the two preceding cases, and is well established, both in England and in this country. *Rex v. Curvan*, 1 *Moody*, C.C., 132; *Buckner's case*, *Style*, 467; *Tooley's case*, 2 *Ld. Raym.*, 312; 1 *Hale*, P.C., 457; *Foster*, 312, § 9; *Reg. v. Phelps*, 1 *Car. & Marsh.*, 180; *S. C.*, 2 *Moody*, C.C., 240; *Stockley's case*, 1 *East*, P.C., 310; *Ferrer's case*, *Cro. Car.*, 371; *W. Jones*, 346; *Kelyng*, 59; *Rex v. Patience*, 7 *Car. & Pay.*, 775; *Rex v. Thompson*, 1 *Moody*, C.C., 80; *Roberts v. State*, 14 *Mo.*, 146; *Com. v. Carey*, 12 *Cush.*, 246; *Tackett v. State*, 3 *Yerg.*, 392; *Galvin v. State*, 6 *Coldw.*, (Tenn.), 291; *The State v. Oliver*, 2 *Houston*, (Del.), 605.

But while this is the general rule, yet the killing may be done under such circumstances of deliberation or cruelty, as will afford proof of *express malice*, in which case it will be murder. *Foster*, 137, 138; *Rex v. Patience*, 7 *Car. & Pay.*, 775; *Reg. v. Allen*, 17 *Law Times*, N. S., 222; *Roberts v. The State*, 14 *Mo.*, 146; *Galvin v. The State*, 6 *Coldw.* (Tenn.), 292. As where prisoners had been some time in custody, and the informality of the warrants under which they were held, was unknown to them, and they deliberately devised and carried out an attack which resulted in the death of one of the officers,—this was held murder, and not manslaughter. *Reg. v. Allen*, *ut supra*. Or if the killing be done with a weapon *prepared beforehand* to resist the illegal violence. *Rex v. Patience*, 7 *Car. & Pay.*, 775. And it has been said in a case already quoted, that if the defendant, "having a right to resist, resisted with unlawful fierceness, the killing would be manslaughter, or, at most, murder in the second degree"—*The State v. Oliver*, 2 *Houston*, (Del.), 610—indicating, it would seem, that malice might be *presumed* from a wanton degree of force in resisting.

4. The law applicable to defence against unlawful arrests, differs from that applicable to defence against trespasses upon property, in this: If a person resisting a trespass upon his property, makes use of a *deadly weapon*, and with it kills the trespasser, it is murder, while in other cases it is ordinarily but manslaughter; but, although a person resisting an illegal arrest, makes use of a deadly weapon, and with it slays his adversary, the crime is not, because of the use of such deadly weapon, raised above the grade of manslaughter. This conclusion is deducible from *Drew's case*, *supra*, and is stated in *Roberts v. the State*, 14 *Mo.*, 147; and the doctrine in its two different branches may be found in many other cases. *Harrison's case*, *ante*, p. 71, and citations. *Tooley's case*, and others, *supra*.

The rule of the Scotch law is different. Thus Baron Hume says: "If, instead of submitting for the time, and looking for redress to the law, he shall take advantage of the mistake, to *stab* or *shoot* the officer, when no

great struggle has yet ensued, and no previous harm of body has been sustained, certainly he cannot be found guilty of a lower crime than murder." 1 Hume Crim. Law, 250. "The distinction appears to be," says Mr. Alison, "that the Scotch law reprobates the *immediate* assumption of lethal weapons in resisting an illegal warrant, and will hold it as murder if death ensue by such immediate use of them, the more especially if the informality or error be not known to the party resisting; whereas, the English practice makes such allowance for the irritation consequent upon the irregular interference with liberty, that it accounts death, inflicted under such circumstances, manslaughter only." 1 Arch. Prin. Cr. Law, 28.

And there is an evident tendency, both in England and in the United States, to depart from the rule which makes a killing in resistance of an unlawful arrest, manslaughter only, and to throw a fuller measure of protection around officers who proceed, frequently at the risk of their lives, in the execution of an honest, but mistaken duty. *Reg. v. Allen* 17 Law Times, N. S., 222; *Rex. v. Ford, Russ. & Ry., C.C.*, 329; *Rex. v. Woolmer*, 1 Moody, C.C., 334; *Galvin v. The State*, 6 Coldw., 282; *Drennan v. The People*, 10 Mich., 169; *Noles' case*, *ante*, p, 697.

5. But since, in this, as in other cases of non-felonious assault, the defendant is justified in resisting with a degree of force and kind of weapon not disproportionate to the injury threatened, it would seem to follow, that if, in resisting without an unnecessary degree of force, and without using a weapon deadly in its character, he should unfortunately happen to kill the person attempting the unlawful arrest, it would be no more than excusable homicide by misadventure, done in the performance of a lawful act. See *Benham's case*, *ante*, p. 115, and note.

Thus, it is said in the case from Delaware, above quoted, that "If the arrest be without lawful authority, and the resistance is only such as is provoked by, and in due proportion to the assault, and the killing was without malice, it would not be murder of any grade, or manslaughter." *The State v. Oliver*, 2 Houston, 604. And again, referring to the same point: "If the prisoner had the right to resist, either because Barker [the officer] had no right to assail his house, or assailed it with unlawful violence, a killing in the proper and prudent exercise of such right of resistance, would be neither murder nor manslaughter; but, if he, having the right to resist, resisted with unlawful fierceness, the killing would be manslaughter, or, at most, murder in the second degree." *Ibid.*, 610.

6. A sixth question to be considered in connection with this subject is, whether a *third person* who interferes and assists in resisting an illegal arrest, will incur the guilt of murder or of manslaughter. This question is raised in the last of the two preceding cases, and it is there said, that if a third person interferes in behalf of his *fellow-servant*, and kills the person attempting the unlawful arrest, he incurs the guilt of manslaughter only; but how it would be in case a stranger should interfere, is not decided.

It is no doubt a correct principle, that whatever a man may *lawfully* do in defending himself, he may lawfully do in defending another. 1 Bish. Crim. Law, § 877, 5th ed. But here, in either event, the act is *unlawful*. The question therefore presented is, whether the unlawful arrest or restraining of the liberty of a third person, will be a sufficient provocation to

me, in case I kill the person attempting such arrest or restraint, to reduce the killing to manslaughter. And it was first resolved in Tooley's case, 2 Ld. Raym., 1296, above cited, that it is. In this case, a woman was arrested as a lewd person, by a constable *out of his precinct*; and after she had been secured in the round-house, three strangers interfered with drawn swords, and killed the constable's assistant, in attempting her rescue. The arrest having been proven to be unlawful, the question arose, whether the rescuers were guilty of murder or manslaughter; and it was held, seven Judges against five, that they were guilty of manslaughter only. But this case has been so severely and forcibly criticized by Sir Michael Foster, that it is doubtful if it possesses much value as an authority. Foster, 312-317. "They saw a woman," says he, "for aught that appears, a perfect stranger to them, led to the round-house under a charge of a criminal nature. This, upon evidence at the Old Bailey, *a month or two afterwards*, cometh out to be an illegal arrest and imprisonment, a violation of *magna charta*; and these ruffians are presumed to have been seized, all on a sudden, with a strong fit of zeal for *magna charta* and the laws, and, in this frenzy, to have drawn upon the constable and stabbed his assistant. It is extremely difficult to conceive, that the violation of *magna charta*, a fact of *which they were totally ignorant at that time*, could be the provocation that led them to this outrage." Foster, 315, 316. Mr. Wharton thinks that Tooley's case was greatly shaken by Foster's criticism, and may now be regarded as entirely overruled. Whart. Hom., 91. It is to be observed, that the five dissenting Judges were agreed that if the woman had been a *friend* or *servant* of the rescuers, it would have been manslaughter only; and this is like the conclusion of the Chief Justice in Drew's case, *supra*. See SUBDIVISION H., *infra*.

7. Another feature of this subject is, that the officer or other person attempting the arrest, must make his official character, for his purpose of arresting, known to the defendant, if it is not already known; otherwise, the defendant stands on the same footing as in any other case of assault. And, since the defendant is entitled to act according to the appearances of danger as they would present themselves to a reasonable man, possessing the same degree of knowledge that he possessed in regard to his situation, it follows that a homicide that in the one case would be either murder or manslaughter, accordingly as the attempted arrest was legal or illegal, would, in the other case, be excusable, as done under a reasonable belief of impending death or great bodily harm. Logue's case, *ante*, p. 263, furnishes a striking example of this principle. The case of Yates v. The People, 32 N. Y., 509, furnishes an illustration equally striking. The prisoner was pursued in the night time, by a shouting mob, threatening his life, and, while endeavoring to escape, under a just apprehension of great bodily harm, if overtaken, was, in his flight, seized by a person, whom, in self-defence, he instantly killed. The person slain turned out to be an officer seeking his arrest. It was held incumbent on the prosecution to prove that the prisoner had knowledge of the official character of the deceased.

But it has been held that killing an officer who attempts to arrest a man will be murder, though the officer has no warrant, and though the man has done nothing for which he is liable to be arrested, if the officer has a charge against him for felony, and the man knows him to be an officer,

though the officer does not notify him that he has such a charge. *Rex v. Woolmer*, 1 Moody, C.C., 334.

8. An eighth question, and one upon which most of the cases turn, relates to the circumstances under which an arrest is lawful or unlawful. This opens up a wide field of enquiry, and one which the little space left at our disposal, will not permit us to enter. The question has been treated by Mr. Bishop, with his usual discrimination and accuracy, in his work on Criminal Procedure, vol. 1, §§ 612 *et seq.* There is one feature of the question, however, which would seem peculiar: If the attempted arrest is unlawful, and the person attempting it is slain, the killing will be no more than manslaughter, although the slayer did not know, at the time, that the attempted arrest was unlawful. Thus; in *Tooley's case*, 2 Ld. Raym, 1296, above cited, it did not appear that the defendants knew, at the time they attempted the rescue, that the arrest was unlawful. *Foster*, 316. So, in *Tackett v. The State*, 3 Yerg., 392, where a constable attempted to arrest a man under authority of a warrant which had no seal, and was killed in the attempt, it was held manslaughter and not murder, although it did not appear that the defendant had inspected the warrant or objected to its informality. This point, however, cannot be said to be clearly established. It arises by inference merely, from some of the cases, and does not seem to be consistent with reason. We have seen from *Sullivan's case*, *ante*, p. 65, and *Rippy's case*, *ante*, p. 345, that if a person kills his antagonist out of malice, and not upon a principle of self-preservation, it will be murder, although the circumstances surrounding him were such that he would have been justified in slaying his adversary in self-defence. The inward *fear*, as well as the outward *danger*, must co-exist to excuse the killing.

Upon a similar principle, it would seem to follow that where the illegality of the attempted arrest is unknown to the defendant, there can be no provocation—nothing which should arouse in him a fury of passion; because *to his mind*, the arrest would not be unlawful. In the absence of provocation, the law would, therefore, in the case of a deliberate killing, presume malice, and it would be murder.

Instances like the case from Yenger, and that of Tooley, seem to savor of technicality; but then it may be said that the criminal law aims at certainty in its rules wherever it is possible to attain it; and in this case, the rule, if it be a technical one, operates in favor of human life, although, as Sir Michael Foster strongly argues, it may operate to the prejudice of society. *Foster*, 316, 317.

The rule by which the legality of the process, for the purpose of justifying an arrest, is to be tested, is founded on the distinction between process which is *void*, and hence a mere nullity—nothing—no protection whatever to the person acting under it, and that which is only *irregular*, or *voidable* in a subsequent proceeding. With regard to this, the rule as stated by Foster doubtless remains unchanged to this day: "I have said above, by way of caution, *if the process be legal*; but I would not be understood to mean anything more than, *provided the process, be it a writ or warrant, be not defective in the frame of it, and issue in the ordinary course of justice, from a court or magistrate having jurisdiction of the case.* There may have been error or irregularity in the proceeding previous to the issuing of the process; but if the sheriff or other minister of justice be killed

in the execution of it, this will be murder, for the officer to whom it is directed, must, at his peril, pay obedience to it. * * * And in the case of a warrant from a justice of the peace, in a matter wherein he hath jurisdiction, the person executing the warrant is in like manner under the special protection of the law; though such warrant may have been obtained by gross imposition upon the magistrate and by false information touching the matters suggested in it."

F.—DEFENCE AGAINST COMMON ASSAULTS.

GALLAGHER v. THE STATE.

[3 MINN., 270.]

Supreme Court of Minn., July Term, 1859.

LAFAYETTE EMMETT, *Chief Justice.*

ISAAC ATWATER,
CHARLES E. FLANDRAU, } *Associate Justices.*

ASSAULTS—DEGREE OF FORCE IN RESISTING.

1. Every assault will not justify a battery; and whether the degree of force used by the party assaulted, was justified by the occasion, is a question for the jury, to be determined by the evidence. It would be error for the Court to instruct the jury, that, if they believed that A. committed an assault upon B., and was about to commit a battery, that B. was justifiable in striking A. in a particular manner.

2. A party assaulted may strike, or use a sufficient degree of force to prevent the intended blow, without first retreating, but he must take care that he use no more violence than may be necessary to prevent the violence of the assault.

3. The jury are the sole judges as to the time when the assaulted party may strike, and the degree of force he may use to prevent violence.

John B. Sanborn, for plaintiff in error; *H. J. Horn*, for the State.

ATWATER, J., delivered the opinion of the Court:

The defendant below, Charles B. Gallagher, was convicted in the District Court of Ramsey county, of an assault and battery upon one Bailey, and sentenced by the Court to pay a fine of fifty dollars and costs. There was some evidence on the trial, tending to show that Bailey committed the first assault, by raising his cane as if to strike the defendant. One witness, Thompson, testified among other things, that "Bailey gave Gallagher the lie, and high words ensued between them. At this time the parties were standing some three or four steps apart. Bailey had a large cane in his hand at this time, which he held about the middle, and with his cane raised, he stepped forward, toward Gallagher, as if about to strike him with the cane. As Bailey came up to Gallagher, Gallagher struck him with his hand or fist, and Bailey sort of rallied backwards a little. I caught him and held him." This is all the evidence on the part of the defence to that point, that appears in the case.

The counsel for the defendant asked the Court to charge the jury as follows, to-wit: "That if the jury believe from the evidence, that Mr. Bailey, previous to, and at the time the blow was struck by Gallagher, had his cane raised for the purpose of striking Mr. Gallagher, and that Mr. Gallagher reasonably supposed that he was about to be struck by said Bailey with said cane, he had a right to strike Bailey as he did, before receiving any blow from said Bailey." The Court refused the instruction, and the defendant excepted.

We see no error in the refusal of the Court to instruct in the language requested by the counsel for the defence. In substance, the charge requested was, that if the jury believed that Bailey committed an assault upon the defendant, and was about to commit a battery, that then the striking was justifiable. This may or may not be true—it is not necessarily so. The difficulty is, that it makes the Court the judge of the degree of force used by the defendant to prevent the battery; whereas, that

is a matter of fact for the jury. Had the instruction requested been so worded, as to have submitted this fact to the jury, it would have been error to have refused it. Every assault will not justify a battery; and whether the degree of force used by the defendant was justified by the occasion, is a question to be determined on the evidence. Phil. on Ev., vol. 5, p. 204.

The Court also charged the jury, that, when any party is approached by another, with a cane raised in a hostile manner, the party thus approached is not justified in striking unnecessarily, but is bound to retreat reasonably before striking any blow.

The first part of the foregoing instruction is correct, but the whole taken alone or in connection with the instructions requested by the counsel for defence and refused by the Court, would tend to mislead a jury. The instruction would give the jury to understand that the party assailed must at least retreat to some extent, before striking or using force to prevent the meditated blow. Such is not the law, but the party thus assaulted may strike or use a sufficient degree of force to prevent the intended blow, without retreating at all. He must, however, take care that he use no more violence than may be necessary to prevent the violence of the assailant. "If, therefore, the plaintiff first lifted up his staff and offered to strike the defendant, it is a sufficient assault to justify the defendant striking the plaintiff, and he need not stay till the plaintiff has actually struck him. Archbold's Crim. Prac. and Plead., 2, p. 282, note and cases cited; Russell on Crimes, 1, p. 758; Ros. Crim. Ev., p. 291. It is true, that a person assaulted is not justified in unnecessarily striking the assailant. But, in the circumstances disclosed by the proof in this case, the defendant was entitled to have the question submitted to the jury, as to whether the striking was justifiable on account of the imminence of the danger to be apprehended by the defendant. The jury are the sole judges as to the time when the defendant may strike, and the degree of force he may use to prevent

violence, and they should understand from the charge, that circumstances may justify a person in striking instantly, without waiting or retreating at all. As we think the jury might have been misled in this respect by the charge, a new trial should be granted.

New trial granted.

NOTE.—It will not be necessary to go into an extended discussion of the law applicable to defence against non-felonious assaults. The principles are few and easily understood. The question has been incidentally discussed in the note next preceding, and in many of the preceding cases in this volume.

1. It is first proper to consider, what acts or demonstrations on the part of one person towards another will justify the latter in striking him in his defence. And first, we encounter the familiar principle, that threats or other mere words, written or spoken, since they do not put a person in physical danger, will not justify an assault. *Murray v. Byrne*, 42 Mo., 472; *State v. Merrill*, 2 Dev., 269; *Selfridge's case*, *ante*, p. 24. The principle applicable here, as in case of felonious assault, has been declared in many of the preceding cases, and may be stated as follows: The danger that will authorize a person to strike in his defence must be immediate and impending; the weapon must be uplifted, the blow about to fall. This, with some modifications, we have seen is the law applicable to defence against felonies, attempted or threatened. *Scott's case*, *ante*, p. 163; *Harrison's case*, *ante*, p. 71; *Rippy's case*, *ante*, p. 345; *Williams' case*, *ante*, p. 349; *Lander's case*, *ante*, p. 366; *Robert Jackson's case*, *ante*, p. 476; and others. From the nature of the case, the rule would be applied more strictly in cases where the attack is plainly non-felonious in its character—where an ordinary battery only is intended. In these cases, the assailed would not be justified in striking in his defence, unless the blow was actually impending—unless it would inevitably fall, if not *then* arrested by the defensive force employed. The person defending would be required to wait longer, and become more fully assured that the impending danger was then about to fall, than, where there is a plain manifestation of a felonious design, in which case, the injury, if suffered, would be irreparable,

The rule has thus been laid down in a late case in Georgia: "When a man goes to another to assail him or demand explanation, or in anger, and the party puts his hand in his pocket, it is an unauthorized presumption, that he has a concealed weapon which he is about to draw and use. Men must depend upon something more substantial, even in appearance, than this, without the existence of threats proven in such case. There must be some definite act—some apparent preparation to draw—something showing the party has in fact a weapon, something more than imagination or *bare fear*, to justify or palliate the commission of acts of violence on the person." *Mitchell v. State*, 41 Ga., 537.

2. In the next place, it may be observed that the degree of resistance ought to be in proportion to the nature of the injury offered; that is, that it be sufficient to ward off such injury, and no more. For the moment a

man disarms or puts it out of the power of the aggressor to do him further injury, he ought to desist from doing further violence; and if he uses any further violence, he in his turn becomes the aggressor. *The State v. Wood*, 1 Bay, 352; *Adams v. Waggener*, 33 Ind., 533; *Fisher v. Bridges*, 4 Blackf., 518; *Philbrick v. Foster*, 4 Ind., 442; *Dole v. Erskine*, 35 N. H., 503; *Castner v. Sliker*, 33 N. J. Law, 99; *Ogden v. Claycomb*, 52 Ill., 365; *Stockton v. The State*, 25 Tex., 776. And in such case his assailant, though first in the wrong, may maintain an action against him for damages. *Adams v. Waggener*, *supra*.

The rule was well stated in a case in Tennessee: "Cases may occur where the plaintiff brings on the difficulty, and the defendant in the first instance acted lawfully, but afterwards, by an unnecessary degree of violence, became a trespasser *ab initio*. In cases of assault and battery, both parties may be guilty of a breach of the peace, and liable to indictment; but a civil action cannot be brought by each against the other. The plaintiff may have been the aggressor. Yet, if the plaintiff had used not only more force than was necessary for his self-defence, but had unnecessarily abused the plaintiff, he cannot, in a civil action, recover damages, but must pay damages." *Chambers v. Porter*, 5 Coldw., 282.

So, it has been said that, "If A. and B. are engaged in a quarrel, and A. assault B. with his fist, without any intention of serious injury being manifested, and B., to prevent the attack, present a pistol loaded and cocked at the bosom of A., intending to shoot him if he struck him, this would be an assault in B. ordinarily. Because he had no right, in the first instance, to resort unnecessarily to such extreme, hazardous and reckless means of defence against a slight attack. It is entirely disproportioned to the threatened aggression." *The State v. Stockton*, 25 Tex., 777.

Again: it has been said, that, unless there is a great superiority in physical strength of an assailant who strikes a blow with his fist, or ill-health in the assailed at the time, or other circumstances, producing relatively great inequality between them in combat, the assailed will not be justified, if he resent the blow by stabbing the assailant. *Floyd v. The State*, 36 Ga., 91. On the other hand, if a person who is assailed with a deadly weapon, knock his assailant down with a stick, he is not guilty of an assault and battery. *The State v. Burwell*, 63 N. Car., 661.

Said GASTON, J., in an important case in North Carolina: "When it is said that a man may, rightfully, use as much force as is necessary for the protection of his person or property, it should be recollected that this rule is subject to this most important modification, that he shall not, except in extreme cases, endanger human life or great bodily harm. It is not every right of person, and still less of property, that can lawfully be asserted, or every wrong that may rightfully be redressed by extreme remedies. There is a recklessness—a wanton disregard of humanity or social duty—in taking, or endeavoring to take, the life of a fellow-being—which is essentially wicked, and which the law abhors. You may not kill, because you cannot otherwise effect your object, although the object sought to be effected is right. You can only kill to save life or limb, prevent a great crime, or to accomplish a necessary public duty." *State v. Morgan*, 3 Ired., 193.

But is unnecessary to extend citations on this branch of the question.

Much of what is said in the preceding note will apply here ; and the principles governing the subject are stated in many of the cases in the first two hundred pages of this volume. The rule may be summed up in the language of Blackstone, that " care must be taken that the resistance does not exceed the bounds of mere defence and prevention ; for then the defender would himself become the aggressor." 3 Bla. Com., 4.

G.—RESISTANCE TO COMMISSION OF FELONIES.

OLIVER v. THE STATE.

[17 ALA., 587.]

Supreme Court of Alabama, January Term, 1850.

(Names of the Judges not in the original report.)

1. The law will justify the taking of life, when necessary, to prevent the commission of a felony ; but not to prevent the commission of a mere trespass on the person or property of another. This rule applied to a killing to prevent the taking away of the defendant's children. [See note, *sub fin.*]

2. Whether the taking away and detaining of a man's children is a felony under the Alabama statute, or a trespass merely, depends upon the *intent* with which they are taken ; and the question of intent is a question of fact for the jury. Hence, it was erroneous to charge the jury that the taking of the defendant's children, *under the circumstances*, would not have amounted to a felony.

3. The necessity that will justify the taking of life need not be actual, but the circumstances must be such as to impress the mind of the slayer with the reasonable belief that such necessity is impending. [Acc. Sloan's case, *ante*, p. 517, 6th resolution ; Morris v. Platt, *post.*]

4. Whether the circumstances are such as to create a reasonable belief in the mind of the slayer that a necessity exists for taking the life of another, is a question for the jury. [Acc. Harris' case, *ante*, p. 276, and references.]

5. In the solution of this question, the jury may consider the condition of both the parties. [Acc. Seibert's case, *ante*, p. 686, note. Contra, Shoultz' case, *ante*, p. 249, note, and other cases collected on pp. 242 *et seq.*]

The plaintiff in error was indicted for the murder of one William E. Hammond. The evidence, so far as it is necessary to a proper understanding of the questions raised by the assignments of error, was substantially this: The accused and the deceased married sisters. During the absence of the deceased from home, Mrs. Oliver, becoming dissatisfied with her husband, left his house, and went to that of the deceased, carrying with her her children, then under the age of twelve years. After the deceased returned, and on the day before the homicide, the accused requested one Alexander, to see the deceased, and ask him to meet him at Alexander's house, for the purpose of conversing with him in reference to his wife and children, which was done, and they met accordingly. On the morning of the homicide, the accused went to the house of Alexander, and informed him that the deceased was to bring his wife and children there on that day, and that they were to endeavor to settle the matter between him and his wife. About one o'clock on that day the deceased arrived, and with him the wife and children of the accused, and as he rode up, he said to the accused, "Here they are; I deliver them to you." It appears that Mrs. Oliver was desirous of going with her children to the house of one Raiford, who lived in Marshall county, Mississippi, and that the accused was willing that she should do so, upon being assured that the children would not be removed from there, and would be delivered to him when required; and for the purpose of obtaining this assurance, the accused drew up an instrument, which he required Mrs. Oliver to sign and swear to, binding her not to remove the children from the house of Raiford, and to deliver them to him whenever he should demand them. Mrs. Oliver was willing to sign the instrument and take the oath, but upon its being read, the deceased remarked, that it was too binding, and that she should not do it; that Raiford was in a moving condition, and if he moved, Mrs. Oliver would have to go with him. To this the accused replied, that if she did not sign the writing,

she should not have the children, and that he would take them himself. The deceased then said, slapping one hand in the other, that he would take them, that he was not afraid, and he thereupon rose from his seat, and "took hold of the accused from behind, and pushed him along before him out of the passage in which they were sitting, some thirty steps." The deceased was much the stoutest man of the two, but did not strike the accused, nor the accused him. Whilst the deceased and the accused were thus engaged, one of the witnesses proposed to part them, when Mrs. Oliver said, "Let them alone, if he kills him." When the witness approached them, he discovered that they were struggling for a pistol, which was held in front of the person of the accused, each having hold of it. The parties fell, either by the deceased throwing the accused, or by the accused sinking down to elude the grasp of the deceased, and the witness then seized the pistol, and took it from them. The deceased being on top, asked the accused if he would behave himself, to which he replied at first, that he would not, but afterwards that he would, whereupon the deceased got off of him. On rising, the accused drew another pistol, and said, "I be damned if I haven't another pistol," and he shook it at the deceased, but said further, "I did not bring it for you, nor do I intend to hurt you." The deceased replied, "I have weapons too, and am not afraid," and drew a knife, but made no effort to use it. It also appears, that, during the scuffle, the accused said all he wanted was his children. After the accused had drawn his second pistol, one of the witnesses told him to put it up, and he thereupon dropped it to his side and walked towards the house, where his wife and children were, and the deceased and the witnesses followed him in a slow walk. The accused put his hands before him, but what he did was not seen, and on reaching the entrance to the house, wheeled and fired at the deceased, inflicting a wound of which he died in fifty-two days thereafter.

Rice, for the plaintiff in error; *M. A. Baldwin*, Attorney-General, for the State.

DARGAN, Ch. J., delivered the opinion of the Court:

Stephen P. Oliver was indicted and tried for the murder of William E. Hammond, in the Circuit Court of Talladega. The jury returned a verdict of guilty of manslaughter in the first degree, upon which the Court sentenced him to be imprisoned in the penitentiary for the term of two years. On the trial, several exceptions were taken to the ruling of the Court, and the cause is brought here for our revision by a writ of error.

* * * * *

Upon the testimony that was introduced, the Court charged the jury: 1st. That if Hammond had taken the children of Oliver under the circumstances, he would not have been guilty of a felony. 2d. That if there was an apparent necessity for Oliver's killing Hammond, in order to get possession of his children, he then was justified in killing him; but unless Oliver had reasonable grounds to believe that the necessity was apparent and pressing, that it did not justify Oliver's killing him, although Oliver might believe it did exist. 3d. That if Oliver shot Hammond as stated, without reasonable ground to believe that there was a necessity to kill him, in order to prevent his taking his children from him, then the homicide could not be less than manslaughter in the first degree.

The 20th section of the third chapter of the Penal Code, enacts "that every person who shall maliciously, forcibly or fraudulently lead, take or carry away, or decoy or entice away any child under the age of twelve years, with the intent to detain or conceal such child from its parent, guardian, or any other person having the lawful charge of such child, shall, upon conviction, be punished by imprisonment in the penitentiary for a period not less than five years. Clay's Dig., 415. And by the 8th section of the eighth chapter, all offences punishable by imprisonment in the penitentiary, are

made felonies. *Ib.*, 439. The Court, by the first charge, undertook to pronounce that the deceased would not have been guilty of a felony, had he carried out his threat and taken the children of Oliver from him by force. That the judge overstepped the law that separates his duty from that of the jury is manifest; for whether Hammond would have been guilty of a felony or not, if he had consummated the threatened act, would have depended on the intent with which it was done. If the intent had not been such as would have rendered the deceased guilty of felony, the act would have amounted to a trespass only, for we cannot imagine that every taking of a child from a father would amount to a felony; as, if a grandfather or other relative should induce a child to leave its father's house and go with him, though this should be done without the knowledge of the father; yet, if the act was the mere result of affection for the child, or the desire to have its company, and did not spring from a corrupt intent to detain or conceal the child from its parent, it could not amount to felony. Nor can we think that if the father and mother quarrel, and, being about to separate, they both contend for the possession of their infant children, that a stranger would necessarily be guilty of a felony, if he interfered and protected the possession of the mother, or even took the child from the father and gave it to the mother; for he might not be influenced by the felonious intent of detaining the child from the father. Such conduct, however, without regard to the intent, would be a violation of the rights of the father; for every father is entitled to the possession and control of his child; but whether it would be a trespass or a felony, would depend upon the intent with which the act was done. To constitute the offence, the criminal intent and the act must both concur, and this intention is a fact to be inferred from the evidence, and can be ascertained only by the jury. The presumption of one fact from another, is a presumption of fact, and unless the law itself draws the inference, the jury alone can do it. In the case of *Castello* and

Keho v. Thompson, 9 Ala., 937, it was said, that the court cannot pass upon the effect of testimony, when the question to be determined is, whether an act was done with a fraudulent intent. To the same effect is the case of Weed & Fanning v. Evans, 2 Speer, 232; see also, 3 Whart., 143; 9 Leigh, 678; Lindsay v. Lindsay, 11 Verm., 621.

There are cases, as we shall presently see, where the law will itself imply one fact from the existence of another. This, however, would be a legal presumption. But in reference to the question now under consideration, there was no one fact proved, from which the law would or would not have drawn the inference of a felonious intent, or from which it would have denied the existence of such intention. It was, therefore, peculiarly the province of the jury to determine the intention that influenced the deceased; for on that would have depended his guilt or innocence. And as the judge undertook to pronounce that the deceased would not have been guilty of a felony, without regard to his intention, or without leaving the question of intention to the jury, he assumed to determine the facts, and consequently erred.

If the second charge was erroneous, the error was favorable to the prisoner. The law, it is true, will justify the taking of life, when it is done from necessity, to prevent the commission of a felony, or to preserve one's own life, or his person from great bodily harm. 4 Bla. Com., 184; 1 Russ. on Cr., 513; 1 Hale P. C., 445. So one may strike to protect his wife, child, or servant, and if the assailant, who intended the felony, be slain, the law considers it homicide in self-defence. But it is not to be understood that the law will justify the taking of life for the purpose of preventing a mere trespass to property, or an assault upon the person, that does not threaten a felony or great bodily harm. 1 Russ. on Cr., 520; Grainger v. The State,* 5 Yerger, 459. The law has never justified the shedding of human blood, to prevent

* *Ante*, p. 238.

slight injuries to the person or the property of others. Nor can we suppose that our predecessors ever intended to hold a different rule, or to depart from those principles which have received the sanction of wisdom, and stood the test of time. In the case of *Johnson v. The State*, 12 Ala., 841, the Court merely affirmed the general rule, that every one had the right to defend his person and property against the unlawful violence of another; but we apprehend that if the accused had been indicted in that case for an assault, instead of resisting process, he would have been convicted. If, however, it was intended by that decision to hold that life may be taken to prevent a mere trespass to property, we should, without hesitation, overrule it. To justify the taking of life, there must be an imperious necessity to prevent the commission of a felony or great bodily harm. Without this necessity, the law, although under some circumstances it will mitigate the crime to manslaughter, cannot hold the party slaying altogether justified. The charge, however, justifies the accused in taking life, without regard to the fact whether the act was done to prevent a felony or not. We can see no reason why he should complain of it.

But the latter part of the second charge informed the jury, that unless the prisoner had reasonable ground to believe that the necessity was pressing, then he was not justified. It is true, that the necessity which exculpates the accused from guilt, need not be actual. If the circumstances be such as to induce a reasonable belief that such necessity exists, the law will acquit the slayer of all guilt; but if there is no reasonable ground for believing that there is such a necessity, then the law cannot acquit him. *Wharton's Crim. Law*, 210; 1 *East P. C.*, 272; *State v. Scott*,^b 4 *Ired.*, 415. It has been said, that if a man kill another through fear, alarm or cowardice, under the belief that great bodily harm is intended him, it is neither murder nor manslaughter, although at the time of the killing, he was in no danger of injury. 5 *Yerg.*,

^b *Ante*, p. 163.

459. We think it wholly immaterial to enquire, in laying down the principle of law, whether the party slaying was in a state of fear or alarm—whether he was a man of firmness of character, or of a weak or cowardly disposition. The question is, whether the circumstances were such as to produce a reasonable belief upon his mind, of a pressing necessity to take the life of the assailant. If they were not, he cannot be justified by law. It may be said that the belief of imminent danger will exist in the minds of some, from circumstances that would produce no idea or belief of danger in the mind of another. This, however, will not alter the principle of law applicable to both. The law requires that the circumstances should be such as to create a reasonable belief of impending necessity. The circumstances are to be ascertained by the jury, and they may consider the condition as well of the party killing as that of the party slain; and if they find the circumstances such as to create a reasonable belief in the mind of the accused that his danger was imminent, then the law would say that he might strike in his own defence. In no point of view has the prisoner been injured by this charge.

* * * * *

The cause, however, must be reversed and remanded for another trial, for the error we have before pointed out.

Judgment reversed.

NOTE.—The doctrine of defence against felonious attempts has been discussed in most of the foregoing cases, and will be further considered in those which follow in PARTS II and III. We have adverted elsewhere to the difference between the doctrine of resisting felonies and other cases of private defence.

To recapitulate briefly:

1. It is the *duty* of every man who sees a felony about to be committed, to interpose and prevent its consummation; Pond's case, *post*; *ante*, p. 30, note; *ante*, p. 159, note; *ante*, pp. 231, 232, note.

2. In performing this duty, he is not obliged to retreat, in order to justify killing the felon, although he may not kill him, if he can arrest him or otherwise prevent the commission of the felony. *Ibid*.

We shall add a few short cases and extracts from cases, and then pass on to the next subject.

State v. Rutherford, 1 Hawks, 457. Supreme Court of North Carolina, December Term, 1821.

This was an indictment for an assault on one Spurlin, with an intent to kill him. The case as proved before NORWOOD, J., was, that the defendant and one Magness, in whose employment Spurlin was, lived near each other; that, during a temporary absence of Magness from his home, one of his slaves had been much injured by the bite of a very fierce dog, owned by Rutherford; on the return of Magness, hearing what had happened, he requested Spurlin to take a gun, go to Rutherford's house, and tell him that if he would permit his dog to be killed, he (Magness) would be satisfied; otherwise, he would seek redress by law; and also instructed Spurlin, if Rutherford consented, to kill the dog.

At dark, Spurlin accordingly went, and took the gun for the double purpose of defending himself from the dog, and of killing him, should Rutherford assent. On arriving within eighty yards of the house, he coughed, and the dog immediately attacked him; after trying in vain to keep the dog off with the gun, he fired, and injured the animal slightly. Rutherford thereupon, immediately came out of his house with his gun, encouraged his dog, and ordered his negroes to pursue the person who had fired the gun; Spurlin, hearing this, ran towards the house of Magness, which was at some small distance, and was pursued by Rutherford, who, when within forty paces of him, without speaking, fired and wounded Spurlin in the head.

On discovering who it was, Rutherford expressed his regret that the whole load had not passed through Spurlin.

The Court, after instructing the jury generally, as to the law, was requested by defendant's counsel, particularly to charge them, that if they believed the defendant, Rutherford, had a well-grounded belief that if the person who fired the gun intended to commit a felony, it would extenuate the offence, and the defendant would be entitled to a verdict. The Court declined doing so, and instructed the jury that there must be a felony committed, or strong and convincing evidence that a felony had been committed, or the party slaying, summoned by a proper officer, to extenuate a killing in pursuit; and that even then, if it should be apparent there was no necessity to kill, the offence would not be extenuated, but would be murder; and that an intention to commit a felony, abandoned by the party, would not warrant a violent arrest. The jury found the defendant guilty; a new trial was refused; and from the judgment and sentence of the Court, defendant appealed.

HENDERSON, J., delivered the opinion of the Court:

The defendant's counsel prayed the Court to instruct the jury, that if they believed that the defendant, Rutherford, had a well-grounded belief that the person who fired the gun, *intended* to commit a felony, it would extenuate the offence, and the defendant be entitled to a verdict. The Court declined to do so, and instructed the jury that there must be a felony *committed*, or strong and convincing evidence that a felony had been committed, or the party slaying, summoned by a proper officer, to extenuate a killing in pursuit. The judge, if he erred at all, erred in favor of the defendant, and against the State. A well-grounded belief that a known felony is about to be committed, will extenuate a homicide committed in

prevention of the act, but not a homicide committed in pursuit, by an individual, of his own accord. To extenuate a homicide committed in pursuit, there must be an actual felony committed; and it is said, that no evidence, however convincing, even the finding of the grand inquest on oath, will supply the want of an actual felony being committed, where an individual of his own accord, commits a homicide in pursuit; because the pursuit by the individual is an officious act, it not being his duty to arrest, unless called on by an officer; and from the tenderness of the law towards the life of a citizen, with which, I presume, is intermixed some portion of policy—for it might be a means of gratifying private revenge. It is to be observed, that some doubts are expressed by Mr. East, where the grand inquest has found that a felony has been committed; but no case is brought forward to support that doubt, and he concludes, that at least, it will be *prima facie* evidence that a felony was committed. But, as I said before, a well-grounded belief that a known felony was about to be committed, will extenuate a homicide committed in prevention of the supposed crime—and this upon a principle of necessity; but when that necessity ceases, and the supposed felon flies, and thereby abandons his supposed design, a killing in pursuit, however well grounded the belief may be, that he had intended to commit a felony, will not extenuate the offence of the prisoner. This extenuation rests upon an actual felony committed, and a necessity for the killing to prevent the escape of the felon: the request of the counsel, and the charge of the Judge in answer thereto, have more the appearance of the discussion of an abstract proposition, than the subject-matter then under consideration; for I am at a loss to perceive, how, in this case, an idea could be entertained by Rutherford, that the person who fired the gun was about to commit a felony. A savage and fierce dog, at an early hour in the night, before bed-time, attacks a person in his owner's yard; a gun is fired at him, but misses him; the dog continues the attack; no attempt is made to take the dog off, the person who fired retreats towards a near neighbor's house; is pursued by Rutherford and fired upon, and struck with shot in a vital part; how it could be supposed that Rutherford entertained a well-grounded belief that the person intended to commit a felony, under these circumstances, I am at a loss to say; and the Judge might have expressed an answer to the counsel's request either way, without affecting the merits of the case; the verdict of the jury would have been the same.

On the doctrine of reasonable ground to believe a felony was about to be committed, see East's Cr. Law, 273-4; Cro. Car., 538; Levet's case, 1 Hale, 42, 474; Browne's case, Leach, 76; that there must be a felony actually committed, East, 300, and the authorities there cited.

I think, therefore, that the defendant has no reason to complain, and that the rule for a new trial be discharged.

TAYLOR, Ch. J., and HALL, J., concurred.

Rule for new trial discharged.

State v. Roane, 2 Devereux, 58, Supreme Court of North Carolina, December Term, 1828.

The defendant was indicted for the murder of Levin, the slave of one McIntire.

On the trial, the evidence was that the deceased, a waiter in the tavern of his master, at 12 o'clock of the night of his death, went to the lot of the defendant, about one-fourth of a mile from McIntire's house. The defendant and his family were in bed, the house locked, and the gate of the yard shut; that defendant was awakened by the sharp barking of his dog; got up, seized the gun, opened the door, and saw the deceased going from the kitchen towards the gate, which opened into the public road; that defendant called and asked who was there, and no answer being returned, fired and killed the deceased as he was opening the gate. All these facts were voluntarily disclosed by the defendant on his examination. He further stated that after the deceased fell, he procured a light and went to the body, when he first ascertained that it was Levin; that he did not intend to strike the negro, but to fire above him and frighten him. After ascertaining who the deceased was, the prisoner immediately went to the house of McIntire, the master, and informed him of the above circumstances. No animosity or ill-will was proved to exist between the defendant and the deceased, who was not in the habit of visiting the defendant's kitchen, and had no business there.

It was in proof that several out-buildings in the neighborhood had been broken open and robbed about the time the deceased was killed, and that a good deal of alarm existed in the neighborhood, caused by depredations committed by runaway slaves.

The counsel for the defendant moved the Court to instruct the jury—

1. That if the defendant had reason to believe that a felony had been committed on his property, they ought to find him excused, and not guilty of any crime, if the killing took place in endeavoring to arrest the deceased for the supposed felony.

2. That if the defendant had reason to believe that the deceased was one of the felons who had committed depredations in the neighborhood, or had committed any other felony, and refused to answer when hailed, the killing was excusable, if it became necessary to an arrest of the deceased.

3. That if the defendant found the deceased in his lot at the late hour of twelve o'clock at night, after the defendant and his family were in bed, and after he had heard of the felonies committed in the neighborhood; if these circumstances, added to the fact that the person of the deceased was then unknown to the defendant, formed a reasonable ground for the defendant to believe, that a felony was about to be perpetrated, the killing was excusable, notwithstanding the mistake under which the defendant labored.

4. That if the defendant did not intend to kill, but only to frighten the deceased, they should find him not guilty of any offence.

The Court refused to charge as prayed, but instructed the jury that if the defendant discharged his gun in a careless, negligent and heedless manner, and thereby caused the death of the deceased, he was guilty of manslaughter, although he did not intend to kill.

Verdict, manslaughter; sentence and appeal to the Supreme Court.

Badger for appellant; *R. H. Jones*, Attorney-General, for the State.

HENDERSON, J.: If the facts stated are true, the defendant has no cause to complain of the verdict; for, although the state of alarm into which the

neighborhood was thrown, by the frequent breaking open of out-houses, might have palliated the homicide, if the negro had been coming into the yard, it cannot have that effect in this case, where it appears he was going out of it. For the law authorizes the killing of one who is in the act of committing a forcible felony, and even one who *appears* to be in the act of doing so, for the purpose of *prevention*, not by way of punishment. As little grounds has the defendant to contend, that his object was to arrest the person. In the first place, when an individual commits a homicide upon the ground of making an arrest, he must show a felony committed, if not by the person killed, at least by some one; and, secondly, that he made known his object, to-wit, *that it was only to arrest*; that the criminal or supposed criminal refused to submit, and that the killing was necessary to make the arrest. Neither can the defendant object to the charge of the Judge about using dangerous weapons with due care, such as firing the gun in the present case, and causing death, although perhaps not actually intended.

But, upon the whole, I am disposed to think this rather an unfortunate than a wicked case; for it appears that the whole of it is taken from the defendant's free and voluntary statement, without which, there would have been no evidence against him. I am, therefore, disposed to think, from what the defendant said, that there was no actual intent to kill, but only to frighten; but he certainly executed the intent in a careless manner. It is, therefore, manslaughter.

Judgment affirmed.

Regina v. John Bull, 9 Car. & Pay., 22; Central Criminal Court, England, February Session, 1839. Before Mr. Justice VAUGHN and Mr. Justice WILLIAMS.

From the evidence, it appeared that the deceased was one of a party of six men who had been drinking together at several public-houses, and were proceeding home along a road between twelve and one o'clock, on the night of the 18th of January, when they met the prisoner, who stabbed the deceased with a knife in the arm-pit. There was some discrepancy between the testimony of the witnesses, as to the conduct of the deceased and his friends, previous to the infliction of the wound by the prisoner.

C. Phillips addressed the jury on the part of the prisoner, and contended that he was entitled to an acquittal, on the ground that what he did was in self-defence, and amounted in law to justifiable homicide.

VAUGHN, J., (WILLIAMS, J., being present), in his summing up, among other things, said, that it was not justifiable homicide, unless there was an intention on the part of the deceased and his companions, to rob or murder the prisoner, or to do some dreadful bodily injury to him; and that it was not the law that a man would be justified in taking away the life of another, merely because he feared he might be assaulted, or, indeed, if he were actually assaulted. His Lordship told the jury that the question for their consideration was, whether the conduct of the prisoner made it *necessary* for the prisoner to inflict that blow which almost immediately terminated in the death of the deceased—whether he inflicted the wound in self-defence, to save his own life, which was in danger, or to protect himself from some dreadful bodily injury.

The jury found the prisoner *guilty*, but recommended him strongly to mercy, believing that he committed the act under the apprehension of personal danger. Sentence—three years' imprisonment, with hard labor, and three months' solitary confinement in the course of the imprisonment.

The reporters, in a note to this case, quote from Archbold's Criminal Law, p. 221, title, MURDER, killing in defence of property, etc., the following paragraph, which contains so fair a summary of the law of justifiable homicide in the prevention of felonies, that it is, perhaps, worth repeating here: "If any person attempt to rob or murder another in or near the highway, or in a dwelling-house, or attempt to break into any dwelling-house in the night-time, and be killed in the attempt, the slayer shall be acquitted and discharged. 24 Hen. 8, chap. 5. And the same where a man is killed in attempting to burn a house. 1 Hale, 488. Or where a woman kills a man who attempts to ravish her. Bac. Elem., 341; Hawk., ch. 28, § 22. Or where a man is killed in attempting to break open a house in the day-time with intent to rob. 1 Hale, 488. Or to commit any other forcible or atrocious crime. Bracton, 155; Foster, 273; Kel., 128, 129; 1 Hale, 484. See *R. v. Levet*, Cro. Car., 538; and see *Fost.*, 299; *R. v. Ford*, Kel., 51. And not only the party whose person or property is thus attacked, but his servants and other members of his family, and even strangers who are present at the time, are equally justified in killing the assailant. 1 Hale, 481, 484; *Fost.* 274. The above rule, however, does not extend to felonies without force, such as picking pockets. 1 Hale, 488. Nor to misdemeanors of any kind; and even in cases within the rule, it must be proved that the intent to commit such forcible and atrocious crime was clearly manifested by the felon. 1 Hale, 481. Otherwise the homicide will be manslaughter at least, if not murder. But in cases within the rule, it may be necessary to observe, that the party whose person or property is attacked, is not obliged to retreat, as in other cases of self-defence, but may even pursue the assailant, until he finds himself and his property out of danger. *Fost.*, 273."

It may be observed, that this author states accurately the law on the subject of retreating in case of felonious assaults and attempts. See note to Selfridge's case, *ante*, p. 28 *et seq.* But is not accurate when it says that the rule which justifies homicide in defence of person or property, does not extend to misdemeanors of any kind; for we have seen in the note above alluded to, *ante*, p. 30, that it extends to homicides necessarily committed in the suppression of riots. It is the duty of every good citizen to endeavor to suppress a riot, [although this may be misdemeanor only, *Pond's case*, *post* ;] and when he finds a mistaken multitude engaged in treasonable practices, to the subversion of all peace and good order, he is protected by law in coming forward with other well-disposed characters to repel them by force. *Respublica v. Montgomery*, 1 Yeates, 421. The rule extends further: Any person, if an affray be made to the breach of the peace *may*, without warrant, *restrain* any of the offenders, in order to preserve the peace; but after the affray is over, he cannot arrest one of them without a warrant. *Phillips v. Trull*, 11 John., 486; 2 Inst., 52; Burn. Just., 92. *Dill's case*, *post*. And see 1 Bish. Crim. Proc., 628. It also extends to the protection of property in warehouses against nocturnal thieves. *Gray v. Coombs*, *post*; *State v. Moore*, *post*.

A person detected in an attempt to commit a felony at night may be lawfully detained without warrant, until he can be carried before a magistrate. *Rex v. Hunt*, 1 Moody C. C., 96.

H.—DEFENCE OF OTHER PERSONS.

DILL v. THE STATE.

[25 ALA., 15.]

Supreme Court of Alabama, June Term, 1854.

WILLIAM P. CHILTON, *Chief Justice.*

DAVID G. LIGON,
GEORGE GOLDTHWAITE, } *Associate Justices.*

MALICE—DEFENCE OF THIRD PERSONS—INTERFERING TO STOP BRAWL, OR TO PREVENT FELONY—APPEARANCES OF DANGER.

1. The law implies malice from the use of a deadly weapon. [Acc. Head's case *ante*, p. 342, and many others. But see Stokes' case, *post*.]

2. Where one interferes to stop a brawl, and exercises no other force than is necessary for the object, having previously announced his purpose, the killing of him by one of the assailants will be murder.

3. If one sees a person about to perpetrate a felony upon another, he may use such force to prevent it as may be necessary, and if while so engaged, he is intentionally killed, it will be murder in the slayer. [See preceding case and note.]

4. As to reasonable apprehension of imminent danger to life or limb, when relied on as a defence. [See Sloan's case, *ante*, p. 517, 6th res., and references.]

LIGON, J., delivered the opinion of the Court:

The appellant was indicted in the Circuit Court of Walker county, for an assault with intent to murder. On the trial, as appears by the bill of exceptions, several

witnesses were examined, who deposed to the following facts: That some time in the month of January, 1851, the appellant and one John Irwin, were quarreling in a retail grocery, in the town of Jasper, while one Burden, stood between them, endeavoring to pacify them. John Henson took off his coat and stepped up to the parties, but said nothing to either of them. The quarrel was kept up from before sunset until after dark. One Jefferson Henson, a relative of John Henson, was also engaged in the quarrel with Dill (the appellant), and both of them had become angry with him about a horse race, and frequently declared during the quarrel that they would have the race, the forfeit, or blood. Some time after night-fall, (the moon giving light), it was announced that the race was ready to be run. John Henson then left the grocery, in company with several others, among them John Irwin and the appellant; the former before and the latter behind the witness. The appellant called out to Irwin, naming him, and saying, "You are a damned liar; you said you could whip me, and that is a damned lie." Irwin and the accused were at this time near each other, and John Henson stepped between them, and proposed that they should leave the matter to him to adjust. This was agreed to by both parties; and he decided they should drop the quarrel and make friends. While this was going on, Irwin was on the left, and the accused on the right side of John Henson, who was thus engaged in attempting to reconcile the matter. The accused attempted to go around John Henson, to get within reach of Irwin; but John Henson moved his body so as to interpose it between the two, and the accused made an attempt to stab Irwin. John Henson seeing this, pushed him off; the accused recovering from the push, exclaimed, "God damn you," and instantly stabbed John Henson, with a large pocket-knife, near the left nipple, inflicting a wound which confined him to his bed for three or four weeks. The knife penetrated the cavity of the body near the heart, or was turned aside by a rib; the physicians could not say

which, but they pronounced the wound dangerous. The accused was proved to have had his knife in his hand for ten or fifteen minutes before John Henson was stabbed; he was told to put it up, but denied having it out. Several persons had persuaded the accused to go home during the evening, but had failed to get him to do so. This is the substance of the proof.

The Court charged the jury in effect: 1st. That unless the prisoner would have been guilty of murder, if Henson had died from the effects of his wound, he could not be found guilty under this indictment of an assault and battery with intent to murder; that the assault and battery not being denied, the only question to consider, was the intent with which the blow was given; and this they were to ascertain from all the circumstances of the case. The Court then correctly defined malice, and proceeded: that, if, on applying the law to the facts as proved, the jury should find the intent to kill coupled with malice, it would be their duty to convict as charged in the indictment.

2d. That if the testimony of the witnesses for the State were true, and the blow struck by the defendant was aimed at John Henson, the defendant would have been guilty of murder, if John Henson had been killed by the blow.

3d. That when one interferes to stop a brawl, and exercises no other force than is necessary for the object, having previously announced his purpose, the killing of him by one of the assailants will be murder.

4th. That where, from the nature of the attack, a man has reasonable ground to believe that there is an attempt or design to take his life, a man will be excusable for killing his assailant, although it should afterwards appear that no felony was intended; yet the man who thus acts, acts at his peril, and these grounds must appear on the trial to the jury to have been reasonable grounds, in order to excuse or justify him.

5th. The Court further charged the jury, that, if the evidence did not satisfy them that the defendant was

guilty of an assault with the intent to kill and murder, they could, if they saw fit, find him guilty of an assault and battery, and assess a fine of not less than one cent, and not to exceed two hundred dollars.

The defendant then asked the Court to charge the jury, that, if they believed from the evidence, others had made threats of great bodily harm, and were improperly following the defendant, and detaining him, and the party assaulted had, by words or acts, induced the defendant to believe that the assailed was one of the parties, or ready to aid the parties in any assault that might be made upon the defendant, and the defendant was in fear of great bodily harm, and that he acted from a sense of personal danger, and not from malice, then they may acquit, although the defendant was mistaken in the actual danger. This charge the Court refused to give, and charged the jury, that, to justify a person acting under apprehension from threats, there must appear to the jury reasonable ground for that person to believe that the threats are, at the time he acts, about to be executed.

The defendant further asked the Court to charge the jury, that, if they believed the circumstances surrounding him were sufficient to create in his mind a reasonable impression of impending danger, or that great bodily harm was about to be inflicted upon him, he was excused in using such force as he thought necessary to protect him, even though death ensued, and the prisoner was honestly mistaken in the circumstances. This charge the Court refused to give, and re-charged the jury, that, the party thus acting must satisfy the jury that he had reasonable ground to believe that the threats of violence were about to be put in execution.

The accused excepted to the charges given, and the refusal to give those that were asked, and he now assigns them for error.

The first charge given by the Court is free from any just exception. By its terms, the jury are told that they must look to every fact and circumstance which was

in evidence before them, in order to ascertain the intention of the accused, and, if from these they believed the stab with the knife was made with malicious intent, it would be their duty to convict. The facts of the case very clearly show that the accused had his knife in his hand, ready to use, before the parties left the grocery; that shortly after leaving it, the accused attempted to renew the quarrel with Irwin, and Henson interposed as a peace-maker, when, on his own proposition, he was selected by Irwin and the accused to settle the dispute between them. While thus engaged in adjusting the quarrel, he saw the accused in the act of attempting to stab his antagonist, Irwin, and he, (Henson) getting between them, pushed the accused back, who, on recovering himself, cursed Henson, and plunged his knife into his left breast near his heart. The person thus stabbed had not quarreled with the accused, had taken no part in the dispute between the parties, but was acting as peace-maker between them. Had the blow been fatal, there can be no question the accused would have been guilty of murder, as the absence of all provocation on the part of John Henson, the weapon used by the accused being deadly in its character, and the force with which its use was accompanied, are circumstances from which the law implies malice. 1 Russell on Crimes, 514, 515, 516, 519.

The second charge simply asserts, that if the jury believed the witnesses on behalf of the State, the accused would have been guilty of murder, if John Henson had died from the blow given with the knife by the accused. We were, at first, inclined to doubt the propriety of this charge, as it appears that witnesses were examined on behalf of the accused, in the Court below, and the charge refers the jury only to the testimony on behalf of the State, and seem to indicate that they might look to this alone in passing upon the guilt or innocence of the accused. This is clearly improper, where there is the least conflict, on a material point, between the evidence offered in defence and that produced by the prosecution; but if there is no conflict in the testimony, and it clearly goes

to establish the conclusion contained in the charge, there would be no error in giving it. In this case there is no conflict whatever, and the conclusion drawn by the Court in the charge referred to, is the only one, which the facts and the law arising upon them will warrant.

The third charge was correct, but more favorable to the accused than the facts of this case will warrant. All the evidence tends strongly to show, that the only purpose of John Henson, at the time he was stabbed by the accused, was to hinder the latter from assaulting John Irwin with his knife, and in all probability killing him; and this, too, when Irwin was off his guard, and neither attempting nor threatening to do the accused any bodily harm. If one see another about to perpetrate a felony, he may use such force to prevent it as may be necessary for that purpose, and, if, while so engaged, he is intentionally killed, it will be murder in the slayer.

The fourth affirmative charge, and the two charges asked by the accused and refused by the Court, as well as the charges accompanying the charges refused, have, in our opinion, no predicate in the testimony as set out in the bill of exceptions; and, as far as the charges given are concerned, the Court erred in favor of the accused. The testimony does not show any attack made on the accused, nor any design on the part of Irwin or Henson to make such attack. The accused renewed the quarrel with Irwin after they left the grocery, without any provocation on the part of the latter; and was himself in the act of making a deadly blow at Irwin, when he was hindered by the timely interference of John Henson, whom he immediately stabbed with the evident intent of killing him. In such a case, we are wholly at a loss to see, how the accused could invoke the aid of a legal principle, which is too favorably set out in the fourth charge, and perverted in the charges asked and refused. *Pritchett v. The State*, 23 Ala., 39.

We are unable to see any error in the record, prejudi-

* *Ante*, p. 635.

cial to the appellant, and the judgment and sentence of the Circuit Court must be allowed to stand.

Judgment affirmed.

BIGGS v. THE STATE.

[29 GA., 723.]

Supreme Court of Georgia, January Term, 1860.

JOSEPH H. LUMPKIN,	} <i>Judges.</i>
CHARLES J. McDONALD,	
HENRY L. BENNING,	
RICHARD F. LYON,	

DEFENCE OF WIFE'S CHASTITY—EXPOSITION OF THE 'GEORGIA STATUTE OF 1856, IN REGARD TO SHOOTING "NOT IN SELF-DEFENCE"—CASES "STANDING ON THE SAME FOOTING OF REASON AND JUSTICE"—PROVOCATION—EVIDENCE.

1. Where a husband is on trial for having made a violent assault upon one who was attempting the seduction of his wife, and the character of the wife for virtue is implicated by the evidence offered for the State, it is competent for the husband to give evidence in support of her general character for chastity.

2. The Georgia statute, which punished shooting, done by one person against another, "except in his own defence," did not make that shooting a crime, where, had the person shot at been killed, it would have been justifiable homicide under the provisions of the Penal Code. The Court is obliged to depart from the letter of the statute, in order to preserve its spirit and intent.

3. The Georgia statute, which, after defining what kinds of homicide shall be deemed justifiable, provides that "all other instances which stand on the same footing of reason and justice, as those enumerated, shall be justifiable homicide," is held to embrace a case where a husband shoots one who is attempting the seduction of his wife; and in such case it is for the jury to say whether the shooting stands on the same footing of reason and justice, as those instances expressly enumerated in the statute. [See note (7), *sub fin.*]

4. Where one who on the previous night had attempted the violation of the defendant's marriage bed, deliberately took his seat near the wife the next morning at the breakfast table, and the husband thereupon fired

a pistol at him, it was held, on trial of the husband for the assault, proper to give in evidence the occurrences of the preceding evening; and it was error to tell the jury that whatever had occurred on the night previous could not amount to a justification or excuse.

The plaintiff in error was indicted in the Court below for an assault with intent to murder. There was also a count for shooting at another, not in his own defence, contrary to the statute in such cases made and provided. The cause was submitted, under the testimony, and charge of the Court, to the jury, who found the defendant guilty under the second count in the indictment, with a recommendation to the mercy of the Court. The following are among the grounds on which the defendant's counsel moved for a new trial:

4. Because the Court ruled out the evidence of George A. Oates, as to the general character of Mrs. Biggs, for virtue and chastity.

5. Because the Court charged the jury, that, if a man kill another, that other being at the time in the act of adultery with the slayer's wife, the killing would be voluntary manslaughter, and not justifiable homicide.

6. Because the Court held that shooting at the adulterer, under such circumstances, would be a violation of the act of 1856, on the same subject; but, that unless a criminal connection be shown in this case, these remarks had no application to the case, and are principles not necessary to be considered by the jury.

7. Because the Court charged the jury, that, under no circumstances of aggravation, however gross and direct, would a man be justifiable in taking the life of another who attempts the seduction of his wife.

8. Because the Court charged the jury, that, if a man shoot at another under such circumstances, and fail to kill, he is guilty of an assault with intent to murder, if there be malice; or, shooting at another, under the Act of 1856, if there be no malice.

9. Because the Court charged the jury, that, although the shooting at another might, if it resulted in death, be

justifiable homicide, yet, if death did not ensue, it would be a crime, under the Act of 1856, unless it were done in self-defence.

10. Because the Court charged the jury, that, the only defence to the crime of shooting another, is that it was done in the prisoner's own defence.

11. Because the Court charged the jury, that, whatever may have occurred on the night previous to the difficulty, at the breakfast table, it could not amount to a justification or excuse for the act of shooting on the morning after that difficulty; and that, if the prisoner commenced the assault at the breakfast table, by laying violent hands upon Parish, and by first shooting at him, even the plea of self-defence is taken away from him.

In the progress of the trial, and in the argument of the case before the jury, the defendant's counsel relied, for his defence, not only on the 12th, 13th and 14th sections of the 4th division of the Penal Code, in relation to self-defence, but also, and mainly upon the 16th section; insisting that this case presented one of those instances which stand upon the same footing of reason and justice, as those enumerated in the previous sections. They contended that if death had resulted from the shooting, it would have been justifiable homicide, and that as death did not ensue, the shooting was not a crime, but was justifiable.

The facts proved are not stated in the original report—an omission which greatly impairs the value of the case.

Millers & Jackson, for plaintiff in error; the *Attorney-General*, for the State.

LUMPKIN, J., delivered the opinion of the Court:

Ought the testimony of George A. Oates, as to the general character of Mrs. Biggs for virtue and chastity, to have been rejected? Her reputation in this respect was implicated, both by the conduct and evidence of Eleazer M. Parish. And, if she was the woman he took her to be, the conduct of her husband would have been less

justifiable in resorting to the means he did, to rescue and protect her from insult and importunity. We hold, therefore, that the proof should have been received.

The ninth charge given by the presiding Judge to the jury, was in these words: "That, although the shooting at another might, if it resulted in death, be justifiable homicide, yet, if death did not ensue, it would be a crime, under the Act of 1856, unless it were done in self-defence."

Such we concede is the letter of the third section of the Act of 1856. It provides that from and after its passage, "any person who shall be guilty of the offence of shooting at another, or at any slave or free person of color, *except in his own defence*, with a gun, pistol, or other instrument of the like kind, shall, on conviction, be punished by a fine not exceeding one thousand dollars, and imprisoned not less than twelve months, or confinement in the penitentiary, at the discretion of the Court." Pamphlet Acts, 1855-56, p. 265.

By the Penal Code, it is justifiable homicide to kill another, not only in self-defence, but in defence of one's habitation, property or family, against one who manifestly intends to commit a felony on either. Can it be believed that the Legislature intended, that if a husband or father shoots at one who is attempting to commit a rape on his wife or daughter, and fails to kill him, he is liable to be convicted under this act and imprisoned in the penitentiary? Never, we apprehend. The effects of such a construction would be too monstrous. We must deviate, then, from the letter of the law, seeing that, if literally interpreted, it leads to such absurd consequences, upon the same principle that it was decided, after long debate, that the Bolognian law, which enacted that, whoever drew blood in the streets should be punished with the utmost severity, did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit.

If it be justifiable homicide to shoot down a burglar who forcibly invades your house with intent to commit a

felony, as it undoubtedly is, and yet, if you fail to kill him, you subject yourself to the penalty of the Act of 1856, the title of the statute should be amended. It should be, "An Act to encourage good shooting." And yet it would seem to be passed for the purpose of preventing shooting altogether, except in cases of self-defence.

His honor, the presiding Judge, charged the jury, "that, under no circumstances of aggravation, however gross and direct, would a man be justified in taking the life of another who attempts the seduction of his wife." This instruction brings up broadly the meaning of the 16th section of the Penal Code. After treating of the various grades of homicide, murder, manslaughter—voluntary and involuntary and justifiable—it is provided that, "all other instances, which stand on the same footing of reason and justice as those enumerated, shall be justifiable homicide."

What is the meaning of this section? It signifies something; and it is the duty of the courts to give it effect. It has been suggested that, to bring cases within this provision, they must be accompanied with force. But has the Legislature so limited it? Is it not more reasonable to suppose, that it was their purpose to clothe the juries, in criminal cases, in which they are made the judges of the law as well as the facts, with large discretionary powers over this class of offences; and leave it with them, to find whether the particular instance stands on the same footing of reason and justice, as the cases of justifiable homicide specified in the Code? Has an American jury ever convicted a husband or father for killing the seducer of his wife or daughter? And with this exceedingly broad and comprehensive enactment standing on our statute book, is it just to juries to brand them with perjury for rendering such verdicts in this State? Is it not their right to determine whether, in reason or justice, it is not as justifiable in the sight of Heaven and earth, to slay the murderer of the peace and respectability of a family, as one who forcibly attacks

habitation or property? What is the annihilation of houses or chattels by fire and faggot, compared with the destruction of female innocence?—robbing woman of that priceless jewel which leaves her a blasted ruin, with the mournful motto inscribed on its portals, “thy glory is departed?” Our sacked habitations may be re-built; but who shall repair this moral desolation? How many has it sent suddenly, with unbearable sorrow to their graves? In what has society a deeper concern than in the protection of female purity and the marriage relation? The wife cannot surrender herself to another. It is treason against the conjugal rights. Dirty dollars will not compensate for a breach of the nuptial vow. And if the wife is too weak to save herself, is it not the privilege of the jury to say whether the strong arm of the husband may not interpose to shield and defend her from pollution?

Finally, the Court charged the jury, “that whatever may have occurred on the night previous to the difficulty at the breakfast table, it could not amount to a justification or excuse for the act of shooting, the morning after the difficulty.” And this instruction was based, no doubt, upon the idea that sufficient time had elapsed for passion to subside, and for reason to resume her sway. In many cases this doctrine is true; but we cannot think it a sound proposition, under the facts and circumstances which surrounded these parties. The husband had heard and seen the personal indignity offered his wife the night before. He permitted Parish to escape, with threats of punishment, should he remain in the city. The very next morning, at the breakfast table, he unblushingly resumes his seat in the immediate neighborhood of his intended victim. Was it human to keep cool in such a situation? To see the man who had attempted to desecrate the family altar the night before, seat himself within two chairs of his wife! And was it not right and proper, in order to account for his violence, to give ~~in~~ proof to the jury, the occurrences of the preceding evening? To shut out the scene which transpired in the bed-chamber, is to

deprive the jury of the power of appreciating the transport of passion kindled in the bosom of Biggs, by the presence of Parish.

With our view of the law, we feel constrained to award a new trial in this case.

Judgment reversed.

NOTE.—1. It is laid down by the writers on criminal law, that under the excuse of self defence, the principal civil and natural relations are comprehended. Therefore, master and servant, parent and child, husband and wife, killing in the necessary defence of each other, respectively, are excused; the act of the person who bears such a relation assisting, being construed the same as the act of the party himself. 1 Russ. Cr., 662; 1 Hale, P. C., 484; 4 Bla. Com., 186; Foster, 274; Pond's case, *post*; Sharp v. The State, 19 Ohio, 387; Staten v. The State, *infra*. And the principle extends to the case of a servant assisting his fellow-servant. Drew's case, *ante*, p. 712. Or a guest his host. Cooper's case, Cro. Car., 544; Curtis v. Hubbard, 1 Hill (N. Y.), 336; S. C., 4 Hill (N. Y.), 437. But there may be cases where a father and son combine together in an unlawful attack upon a third person, in which it will be improper to permit the jury to consider the relationship between them. The true principle is said to be, that a son may aid his father, if the father be not in the wrong. But if the father wantonly attack a third person, and the son come into the conflict for the purpose of aiding the father in the unlawful assault, the son cannot avail himself of this relation as a defence. Sharp v. State, 19 Ohio, 389.

2. Upon the question, under what circumstances a *stranger* may defend another, we have suggested elsewhere, that, is a general rule, whatever a man may lawfully do for himself, he may lawfully do for another. *Ante*, p. 717. Thus, where a felony is attempted upon another person, it is the duty of a bystander to interpose and prevent it. Dill's case, *ante*, p. 738; Pond's case, *post*; 1 Hale, P. C., 484. "Every man," says Lord Hale, "is thus far an officer." *Ib*. The promptings of humanity, as well as the duty which one man owes to another, and to the laws under which he lives, demand, that when a person sees great bodily injury being inflicted upon an individual, and the looker-on has a means or ability to prevent the injury, he shall use such means; and if he do not, but idly stand by without interfering to prevent the commission of the crime, although the law will not hold him in any degree guilty of the particular crime committed, yet he is by no means guiltless in the eyes of the law. Connaughty v. The State, 1 Wisc., 165. He is guilty of a substantive misdemeanor, called misprision of felony. *Ante*, p. 30. And, furthermore, he incurs the danger of being prosecuted as a principal. Thus, in the case just quoted from, the defendant, Connaughty, awakened by a midnight brawl in the street, stood passively in the door of his dwelling, and saw a murder committed. He was indicted for murder jointly with the person who did the killing; was convicted of murder in the first degree, and sentenced to death; and but for the interposition of a Court of Errors, would probably have been executed. 1 Wisc., 159-171. It has been held, that when a house is feloniously attacked, although it be a public-house, a lodger therein may justify kill-

ing the assailant. Cooper's case, Cro. Car., 544. Likewise, private persons may justify breaking and entering another's house and imprisoning the owner to prevent him from murdering his wife. *Handock v. Baker*, 2 Bos. & Pul., 260. And it was long ago held, that a man might lawfully assemble his friends for the defence of his *habitation*, although it was not lawful for him to assemble them for his defence elsewhere. 21 H. 7, 30; 5 Coke, 92. But this is a branch of the subject which belongs more properly to PART II. of this volume.

3. Again: where the injury threatened is less than a felony; where, manifestly, nothing more than an ordinary battery is intended, a third person may likewise interpose in defence of the person who is being assailed and beaten; but here, as in cases of self-defence, he must take care to use no unnecessary degree of violence. *Ante*, pp. 723, 724. Thus, where A. was fighting his brother, and to prevent this, B. laid hold of A., and held him down upon a locker on board a barge on which they were, but struck no blow, and thereupon A. stabbed B.; it was held, that if B. did nothing more than was sufficient to prevent A. from beating his brother, and had died of this stab, the offence of A. would have been murder; but that if B. did more than was necessary to prevent the beating of A.'s brother, it would have been manslaughter only. *Rex v. Bourne*, 5 Car. & Pay., 120. Likewise, a stranger in one's house may lawfully resist an unlawful attempt of an officer to break into the house and remove the goods of the owner. *Curtis v. Hubbard*, 1 Hill (N.Y.), 336; S. C., 4 Hill (N.Y.), 437.

4. It would seem that where one espouses the quarrel of another, and is slain, the homicide will be of the same degree that would attach to it, had the person whose quarrel he espoused been slain instead of him. Thus, where a wife had made so gross an assault upon the defendant, that had he killed her, it would have been no more than manslaughter, and her husband espoused her quarrel and was immediately slain, it was held manslaughter only. *The State v. Roberts*, 1 Hawks, 351. It likewise holds that one who, being present, assists another, and the person assisted slays his antagonist, the assistant stands on the same footing in respect of his guilt or innocence, as the person whom he assists. *Riley and Stewart's case*, *ante*, p. 163. And this rule is applicable where the assistant and the assisted occupy some of the natural or civil relations to each other, as well as where one stranger assists another. *Sharp v. The State*, 19 Ohio, 389.

5. We have seen, *ante*, pp. 220 *et seq.*, that if a person brings about a difficulty or quarrel, or voluntarily engages and continues therein, and if, in the course of the combat, he is obliged to kill his adversary in self-defence, he will not be heard to urge this necessity produced by his own wrongful act, as an excuse or justification of the homicide. This principle seems to apply equally to a case where a person advises and brings about a combat between two others, and then kills one of them to prevent him from killing the other. A case in Georgia will illustrate the meaning we intend to convey. The three actors in the tragedy were Cole, the deceased; Thompson, whom Cole had accused of committing adultery with his wife; and Mitchell, the defendant. Cole had frequently declared that he had caught Thompson in adultery with his wife, and that he would kill him on

sight; and Mitchell had declared that he would not permit Thompson to be killed. The three met at a grocery. Mitchell took Thompson one side, and said to him, "Spring your triggers and cock your gun; shoot him first, if you can, God damn him, for its his notion to shoot you." Cole got on his horse and rode towards Thompson and Mitchell. Thompson, from behind a tree, snapped at him, but his gun missed fire. Cole then threw up his hand and cried, "Lord have mercy, he is going to shoot me," and immediately drew a pistol from his saddle wallet. In drawing it out, it went off accidentally, in an opposite direction from where Thompson and Mitchell were. Thompson then threw down his gun and ran, and Cole sprang from his horse and pursued Thompson, and while pursuing, Mitchell fired and killed Cole. Mitchell was convicted of murder, and the conviction was affirmed in the Supreme Court.

In the course of the trial, the presiding judge charged that "the prisoner had the right to kill to prevent the commission of an atrocious crime, such as murder, manslaughter, or the like, upon another; but he must have acted in good faith, and must first have used all reasonable means in his power to prevent the perpetration of the crime; that if, after using all reasonable means in his power to prevent Cole from killing Thompson, he was unable to prevent it otherwise than by killing Cole, he had a right to do so, provided he acted for the public good; or, to say the least, he must have acted in good faith; *but that this principle of law would not avail him, if he acted in concert with Thompson in bringing about the difficulty—took part in the quarrel—made himself a party to it, and aided and assisted in bringing about the fatal rencounter.*"

LUMPKIN, J., said: "We do not think the prisoner had any cause to complain of this charge. Concede the common law doctrine that a homicide is justifiable for the prevention of any forcible and atrocious crime, must there not be an apparent necessity on the part of the slayer—yea, an absolute necessity for the act—to make the killing justifiable? And must it not have been done *bona fide* to save life, and not wantonly or wickedly to destroy it? Under the pretext of punishing a felony, had Mitchell, the author and finisher of this whole tragedy, the right to kill in a spirit of revenge, and in the execution of a preconceived plan and purpose? Upon the proof in this case, does this killing stand on the same footing of reason and justice, as that of a woman who kills another to save her person from lustful violence? And ought not the Court, in stating the principle, to have qualified it as he did? Had he failed to do so, the grossest abuse of a very delicate doctrine would have been the inevitable consequence. Is it probable that Cole would have killed Thompson, had he not been shot by Mitchell? There was a time when trespassers in aristocratic parks might be slain, provided they refused, upon summons, to surrender themselves to the keepers. That day is past. The law is more tender of human life. But even under the statute *de malifactoribus in parcis*, it was incumbent on the keeper to show, that the deer-stealers could not but escape unless they were killed. The burden is upon the defendant in this case, to show that he was without fault on his part. That he killed to prevent murder."

6. Whether a person who interferes and kills one man to prevent him from killing another, will be excused if he acted upon appearances which proved to be false. It will be observed that LUMPKIN, J., goes so far in the

case last quoted from, as to say that in such a case, there must have been an *absolute necessity* for the act. But this is evidently a hasty remark of the learned judge, not called for by the question under consideration, and it is doubtful whether it is entitled to much weight. In a *nisi prius* case in New York, however, the rule is laid down in the same way. After stating the usual doctrine that a man who is himself assailed is justified in killing his assailant, if he has reasonable grounds to believe that such killing is necessary to his own preservation, EMORR, J., told the jury that they "must be satisfied that it was actually necessary to prevent the commission of a homicide upon KIPP, [a third person,] at the time the shots were fired, for the prisoner to kill Aaron Cole, in order to sustain his defence. If you think so, you will acquit the prisoner. But if this act was not necessary—clearly and strictly necessary—you will be unable to acquit the prisoner." The jury did acquit the prisoner, and therefore this instruction was never reviewed in a court of error. We shall see by Pond's case, *post*, that where a man kills another in defence of his servant, the doctrine that reasonable appearances of danger excuse the homicide, applies as in other cases. And the same principle is applicable where a husband kills a man who has entered his wife's bed-room with the apparent purpose of ravishing her. This will appear from the case of *Staten v. The State*, 30 Miss., 619, which was heard in the High Court of Errors and Appeals of Mississippi, in 1856, before SMITH, Ch. J., and HANDY, J.

Extract from the opinion of the Court, by HANDY, J.: "The Court instructed the jury at the instance of the State, as follows:

"If the jury believe from the evidence, that the defendant killed the deceased at a time when there was no danger from the deceased to the defendant's family or sister, and upon revenge for a supposed insult to his family, and in heat of blood, this is, at least, manslaughter.

"If the jury believe from the evidence, that Hamblin was unarmed at the time the defendant killed him, and there was no real or apparent danger from him at the time of the killing, either to Staten himself, or to his wife, or sister, or family, then the killing is neither justifiable nor excusable."

"Without a particular detail of the evidence or of the circumstances under which the killing was done, it is sufficient, for the purpose of testing the propriety of these instructions, to observe, that there was testimony tending to show that the deceased had entered the bed chamber in which the wife of the accused, (she being sick at the time,) and his sister were asleep, and after midnight; that he aroused the sister by putting his hand on her; that she told him to go away, and that he went under Mrs. Staten's bed, which was in the same room; that, after a short time, she went into the room where Staten was sleeping and awoke him, and told him that the deceased was in his wife's room; and he arose and went immediately into his wife's room, and a noise like the falling over chairs was heard; and that shortly afterwards the deceased was seen bleeding, and lived but a short time, being stabbed in several places. There was also evidence tending to show that the deceased took supper that night at Staten's house, and was there after supper, and in the room where Staten's wife was, in company with Staten; but that Staten supposed he had gone home, when he was informed by his sister that he was in his wife's room.

"The statute provides that homicide is justifiable 'when committed in the lawful defence of a person, or of his or her husband, wife, parent, child, master, mistress, or servant, when there shall be a reasonable ground to apprehend a design to commit a felony, or to do some great personal injury, and there shall be imminent danger of such design being accomplished.' Hutch., Code, 957.

"The instructions above stated, do not declare the rule in conformity to this statute. If the accused had a 'reasonable ground to apprehend a design to *commit a felony or do some great personal injury* to his wife, and there was imminent danger of the design being accomplished,' he was justified in killing. But the instructions do not give the accused the benefit of the apprehension of danger, in the particulars specified in the statute; and the jury were left free to put whatever construction they deemed proper on the general terms, '*danger to himself or his wife*,' etc. They might have supposed that it required *danger to life*, in order to justify the killing, and hence concluded that, as there was no evidence of such danger, the killing was unjustifiable; whereas, the statute distinctly recognizes a just apprehension of immediate danger of the commission of a felony, or of some great personal injury or bodily harm, as a justification. The plaintiff in error was entitled to have the rule thus distinctly declared to the jury; and for the error in this respect in the instructions, the judgment is reversed, and the cause remanded, and a new trial awarded."

There would seem to be no reason why the same rule should not apply where one stranger interposes to save the life of another; although a stranger would doubtless be held to a greater degree of caution and prudence, than would be required in one who was himself assailed. In accordance with this view, Lord Hale states the rule upon a hypothetical case, as follows: "If A., B. and C. be of a company together, and, walking in the field, C. assaults B., who flies; C. pursues him, and is in danger to kill him, unless present help; A. thereupon kills C., in defence of the life of B. It seems that in this case, of such an inevitable danger of the life of B., this occision of C. by A. is in the nature of *se defendendo*. But then it must appear plainly by the circumstances of the case as the manner of the assault, the weapon with which C. made the assault, etc., that the imminent danger of the life of B. be apparent and evident." 1 Hale P. C., 484.

7. The case of Biggs, *supra*, is certainly a very peculiar case. It might not be going beyond the bounds of moderate criticism to pronounce it an extraordinary case. The judge who pronounced the opinion was deservedly eminent. He was the "old man eloquent" of the Supreme Court of Georgia. Before committing his opinions to paper, he pronounced them orally from the bench, and crowds gathered to hear him. This habit, no doubt, contributed to make his otherwise vivid imagination at times heated beyond that degree of calmness and moderation, which should characterize legal judgments. Hence, the reasons with which his conclusions are supported, as well as the conclusions themselves, deserve at times to be closely scanned, before being accepted as law.

With reference to the case under consideration, it may be observed—

a. That seduction does not appear to have been punished as a crime in Georgia at the time of this decision. It is not found in the catalogue of

offences enumerated in the fourth division of the Penal Code of Georgia, which treats of offences against the person; nor, in the tenth division, which treats of offences against public morality and decency. By section five of the tenth division, adultery and fornication are punishable by fine not exceeding five hundred dollars, and imprisonment not exceeding sixty days. These offences are thus misdemeanors only.

b. Even if the seduction of a man's wife were a felony, still, it is not, like rape, a felony of a *forcible* character, and, hence, may not be resisted by killing the person attempting it. See *ante*, p. 737, note; Pond's case, *post*. The reason of the rule is, that homicide is justified only on the ground of necessity; and there is no necessity in resisting a secret and cowardly crime by such extreme means. ✓

c. The rule applicable to killing upon provocation produced by such offences is, that if a husband immediately slay one taken in the act of adultery with his wife, it is manslaughter only. *State v. Samuel*, 3 Jones, Law, 74; *State v. Neville*, 6 Jones, Law, 433; *State v. John*, 8 Ired., 330, 336; Foster, 296; 4 Bla. Com., 191; 1 Hale, P. C., 486; Manning's case; Raym., 212; *People v. Horton*, 4 Mich., 83. But to slay one because he had, before that time, committed adultery with his wife, is murder. *State v. Samuel*, 3 Jones, Law, 74; *State v. John*, *ut supra*; *State v. Neville*, *ut supra*; Foster, 296. Thus, in a prosecution for murder, it was held that evidence, that the evening preceding the homicide, the deceased came to the prisoner's house, and had the prisoner's wife on the bed with her clothing up and attempted to ravish her, was properly rejected; because, if admitted, it could not have had the effect of mitigating the crime. *State v. Neville*, *ut supra*. ✓

Sir Michael Foster expresses the reason of this rule, as follows: "For let it be observed that in all possible cases, deliberate homicide upon a principle of revenge is murder. No man, under the protection of the law, is to be the avenger of his own wrongs. If they are of such a nature for which the laws of society will give him an adequate remedy, thither he ought to resort. But, be they of what nature soever, he ought to bear his lot with patience, and remember that vengeance belongeth only to the Most High." Foster, 296. ✓

d. The Georgia statute, expounded in the principal case, is substantially in affirmance of the common law. The only point of difference we have been able to discover is, that it makes killing justifiable under some circumstances, in repelling a forcible invasion of one's *property*, without reference to the question whether the invasion would have amounted to a felony, or to a trespass merely. Even the language of section 16, that "all other instances which stand on the same footing of reason and justice as those enumerated, shall be justifiable homicide," contains nothing new. It is simply a repetition of the language used by Foster and East with reference to the statute 24 Hen. VIII., ch. 5. Foster, 276; 1 East, P. C., 272. It cannot be supposed that these eminent writers, when they used this language, intended to hint that *juries* should have unrestrained power to determine what offences shall be deemed to stand upon the same footing of reason and justice, as those enumerated in the statute of Henry VIII. It has been well said, in a case in Tennessee, that "the facts being found or admitted, what shall constitute homicide excusable, or manslaughter,

is a conclusion of law, and not of fact." *Claxton v. State*, 2 Humph., 183; and see *State v. Craton*, 6 Ired., 172. And the judge may tell the jury that if they believe certain facts, such facts do or do not, make out a case of homicide *se defendendo*. 2 Humph., 172. And we have already seen, that, the law upon this subject being expounded to the jury, it is their province to determine whether the facts do or do not make out a case within the law. *Harrison's case*, *ante*, p. 276, and references. The rule declared in the principal case, would make the law of justifiable homicide a subject of legislation by juries; and the law would become as uncertain as the whim of each successive jury, that might be empanelled in a capital case. Even the authority of *the Court*, in this instance, to depart from the settled principles of the common law, and to set up a new rule of justifiable homicide, under the authority of a statute which simply states a pre-existing rule of the common law, may well be questioned. "With respect to the case of adultery," said RUFFIN, J., in the case from North Carolina last quoted, "the law is found in the most ancient archives of the common law, and has been brought down to us in the same plain and precise terms by the ablest Judges, and the most eminent writers on the criminal law, and a Court at this day has no more authority to interpolate new qualifications or exceptions into it, than power to make a statute. But the rule of the common law on this head, stands not alone on its authority. It is commended, as well, by its wisdom. Homicide is extenuated to manslaughter, not by the fact that it was perpetrated in a fury of high passion, but by the fury's being excited by a present provocation, which the law deems sufficient for the time, to deprive men in general, of that power of reason and reflection, which ought to lead them to appeal for redress to the law, and instead thereof, prompts them to take the law into their own hands. The wrong is thus infallibly known and the wrong-doer is thus made instantly to expiate it with his blood. But when a husband only hears of the adultery of his wife, no matter how well authenticated the information may be, or how much credence he may give the informer, and kills either the wife or her paramour, he does it not upon present provocation, but for a past wrong—a grievous one indeed; but it is evident he kills for revenge. Let it be considered how it would be if the law were otherwise. How remote or recent must the offence be? How long or how far may the husband pursue the offender? If it happen that he be the deluded victim of an Iago, and after all, that he has a chaste wife, how is it to be then? These enquiries suggest the impossibility of acting on any rule but that of the common law, without danger of imbruing men's hands in innocent blood, and certainly of encouraging proud, heady men to slay others for vengeance, instead of bringing them to trial and punishment by law. It is obvious that these observations apply with equal force to an alleged rape, or an attempt to commit a rape on a wife at a past time; and this case furnishes a forcible illustration of the extreme hazard of extenuating the offence of taking the life of a fellow-man upon information." *State v. Neville*, 6 Jones, Law, 433, 434.

On the other hand, it has been held, that when a man finds his wife in the road with a man whom he has good reason to believe has either committed, or is about to commit, adultery with her, he may lawfully stop such person in the road, and detain him until he surrenders up the custody

of his wife; and if, while so doing, he is killed by such person, it will be murder, and not manslaughter. *State v. Craton*, 6 Ired., 164.

In a case in Texas, the defendant, a freed person of color, had cohabited for several years with a freed woman of color, and in this relation they had had two children. They occupied the same bed in a room with other freed people. The defendant being up and but partly dressed in the morning, the deceased came in and told the woman he had come for a fuss, and struck and kicked her. He then went out, saying that he would go and feed his mules, and then return and have the fuss out. But the woman continuing to talk, he returned immediately, and again commenced beating her; whereupon, the defendant fired a pistol from the stairway, killing the deceased. It was contended, that the relation of concubinage, or whatever it was, having been established, the accused had a right to take life in defence of the woman; and the accused undertook to read to the jury the provisions of the Texas Code in relation to defence of person or property, *ante*, p. 182; but the Court told the jury that that law had no application to the case, and the defendant excepted. The prisoner was convicted of something—the imperfect report does not state of what—and was sentenced to the penitentiary for seven years. Without noticing this question, the Supreme Court, (LINDSAY, J.), state that they have carefully examined the record, and find no error to the prejudice of the accused. *Parker v. The State*, 31 Tex., 132.

I—SELF-PRESERVATION BY THE DESTRUCTION OF INNOCENT PERSONS.

UNITED STATES v. HOLMES.

[1 WALLACE Jr., 1.]

Circuit Court of the United States, for the Third Circuit, April Sessions, 1842.

Mr. Justice BALDWIN, Presiding.

SELF-PRESERVATION BY DESTRUCTION OF INNOCENT PERSONS—SAILORS THROWING OVER PASSENGERS AT SEA.

Seamen have no right, even in cases of extreme peril to their own lives, to sacrifice the lives of passengers, for the sake of preserving their own.

On the contrary, being common carriers, and so paid to protect and carry the passengers, the seamen, beyond the number necessary to navigate the boat, in no circumstances can claim exemption from the common lot of the passengers.

On the 19th of April, 1841, the American ship William Brown, having on board sixty-five passengers and seventeen of a crew, struck an ice-berg and foundered in mid-ocean, two hundred and fifty miles S. E. of Cape Race. The captain, second mate, seven of the crew, and one passenger got into the jolly boat. The first mate, eight seamen, (of whom the prisoner was one), and thirty-two passengers got indiscriminately into the long boat. The remainder of the passengers, thirty-one in number, went down with the ship and perished. The first mate was placed in the long boat, with a chart, quadrant and compass, because he understood navigation.

The following morning, the captain, being about to part company with the long boat, advised its crew to obey all the orders of the mate as they would obey his, the captain's; and this the crew promised they would do.

Six days after the disaster, the jolly boat was picked up by a French fishing lugger.

The long boat was loaded nearly to the water's edge, and was in great jeopardy. She could only be kept afloat by constant bailing. A moderate blow, or collision with a piece of ice, or a mishap in steering, would surely have swamped her. She could never have been rowed to shore with the load she carried.

On Tuesday morning, after the long boat and jolly boat parted company, it began to rain, and continued to rain throughout the day and night of Tuesday. At night the wind began to freshen; the sea grew heavier, and once or oftener the waves splashed over the boat's bow, so as to wet all over the passengers who were seated there. Pieces of ice were still floating, and during the day ice-bergs were seen. About ten o'clock of Tuesday night, after the long boat, freighted as before stated, had been afloat fully twenty-four hours, *the pris-*

oner and the rest of the crew began to throw over some of the passengers, and did not cease until they had thrown over fourteen male passengers, and, it seems, two women. These, with the exception of two married men and a small boy, constituted all the male passengers on board. Not one of the crew was thrown over, although one of them, the cook, was a negro.

No lots were cast. The only principle of selection was that dictated by the mate, not to part man and wife, and not to throw over any woman.

Early on the following morning, the long boat was picked up by the ship *Crescent*; and all who had not been thrown over were thus saved.

The testimony was not clear as to the degree and imminence of the danger at the time the throwing over began; but it appeared that the boat had provisions for six or seven days.

The prisoner was the only one who did not finally become prostrated; and it was through his exertions that the boat was discovered and picked up.

Among the passengers thrown overboard by the defendant was one Charles Askin; for whose *manslaughter* he was indicted, under the Act of April 30, 1790, § 12, "*for the punishment of certain crimes against the United States.*"

William Meredith, District Attorney, for the United States; with whom was *Mr. Dallas* and *Mr. O. Hopkinson*.

Mr. David Paul Brown, *Mr. Hazelhurst* and *Mr. Armstrong*, for the prisoner.

Mr. Dallas argued the case with great force for the Government, citing (among other things,) Bacon's Works, by Montagu, vol. 13, p. 161, Lond. 1831.

Mr. Armstrong opened for the defence; and was followed by *Mr. Brown*, who, in the course of his eloquent argument, cited Rutherford's Institutes of Natural Law, Book I, ch. 16, § 5, to the effect that the law of nature "cannot be supposed to oblige a man to expose his life

to such danger as may be guarded against ; *and to wait till the danger is just coming upon him*, before it allows him to secure himself." Also the following passage from the same section : " I see not, therefore, any want of benevolence which can be reasonably charged upon a man in these circumstances, if he takes the most obvious way of preserving himself, *though perhaps some other method might have been found out, which would have preserved him as effectually, and produced less hurt to the aggressor*, if he had been calm enough, and had been allowed time enough to deliberate about it."

He also cited Grainger's case, 5 Yerg., 459, *ante*, p. 238, to the effect that, "*if a man, though in no great danger of serious bodily harm, through fear, alarm or cowardice, kill another, under the impression that great bodily injury is about to be inflicted on him, it is neither manslaughter nor murder, but self-defence.*"

He also cited The Mariana Flora, 11 Wheat., 51 ; The Louis, 2 Dodson, 264 ; Bacon's Works, by Montagu, vol. 13, p. 160, Lond., 1831 ; and 4 Bla. Com., 186.

Mr. Justice BALDWIN charged the jury.

He alluded to the touching character of the case ; and after stating to the jury what was the offence laid in the indictment, explained with particularity the distinction between murder and manslaughter. Malice was of the essence of murder, while want of criminal intention was consistent with the nature of manslaughter. The mere absence of malice did not render homicide excusable ; the act might be unlawful, as well as the union of the act and intention ; in which union consisted the crime of murder. After giving several familiar instances of manslaughter, to explain that, although homicide was committed, there was yet an absence of bad motive, his honor proceeded with his charge nearly as follows : In such cases the law neither excuses the act nor permits it to be justified as innocent ; but, although inflicting some punishment, yet she looks with a benignant eye through the thing done, to the mind and to the heart ; and when, on

a view of all the circumstances connected with the act, no evil spirit is discerned, her humanity forbids the exaction of life for life. * * * * *

It is a different thing, when we are asked not to *extenuate*, but to *justify* the act. In the former case, our decisions may, in some degree, be swayed by feelings of humanity; while in the latter, it is *the law of necessity* alone, which can disarm the vindictory justice of the country. Where, indeed, a case does arise, embraced by this law of necessity, the penal laws pass over such case in silence; for law is made to meet but the ordinary exigencies of life.

But the case does not become "a case of necessity," unless all ordinary means of self-preservation have been exhausted. The peril must be instant, overwhelming; leaving no alternative but to lose our own life, or to take the life of another person.

An illustration of this principle occurs in the ordinary case of self-defence against lawless violence, aiming at the destruction of life, or designing to inflict grievous injury to the person; and within this range, may fall the taking of life under other circumstances, where the act is indispensably requisite to self-existence. For example: Suppose that two persons who owe no duty to each other that is not mutual, should, by accident not attributable to either, be placed in a situation where both cannot survive. Neither is bound to save the other's life by sacrificing his own; nor would either commit a crime in saving his own life in a struggle for the only means of safety. Of this description of cases are those which have been cited to you by counsel, from writers on natural law; cases which we rather leave to your imagination than attempt minutely to describe.

Again, I state, that when this great "law of necessity" does apply, and is not improperly exercised, the taking of life is divested of unlawfulness.

But, in applying this law, we must look not only to the jeopardy in which the parties are, but also to the relations in which they stand.

The slayer must be under no obligation to make his own safety secondary to the safety of others.

A familiar illustration of this principle presents itself, in the obligations which rest upon the owners of stages, steamboats, and other vehicles of transportation. In consideration of the payment of fare, the owners of the vehicle are bound to transport the passengers to the place of contemplated destination. Having in all emergencies the conduct of the journey and the control of the passengers, the owners rest under every obligation for care, skill, and general capacity; and if, from defect of any of these requisites, grievous injury is done to the passenger, the persons employed are liable. The passenger owes no duty but submission. He is under no obligation to protect and keep the conductor in safety; nor is the passenger bound to labor, except in cases of emergency, where his services are required by unanticipated and uncommon danger.

Such is the relation which exists on ship-board. The passenger stands in a position different from that of the officers and seamen; it is the sailor who must encounter the hardships and perils of the voyage.

Nor can this relation be changed when the ship is lost by tempest or other danger of the sea, and all on board have betaken themselves, for safety, to the small boats; for imminence of danger cannot absolve from duty. The sailor is bound, as before, to undergo whatever hazard is necessary to preserve the boat and the passengers. Should the emergency become so extreme as to require the sacrifice of life, there can be no reason why the law does not still remain the same. The passenger, not being bound either to labor, or to incur the risk of life, cannot be bound to sacrifice his existence to preserve the sailor's. The captain, indeed, and a sufficient number of seamen to navigate the boat must be preserved; for *except these abide in the ship, all will perish*; but if there be more seamen than enough to manage the boat, the supernumerary sailors have no right, for *their* safety, to sacrifice passengers. The sailors and passengers, in fact,

cannot be regarded as in equal positions. The sailor, to use the language of a distinguished writer, *owes more benevolence to another than to himself*. He is bound to set a greater value on the life of others than on his own.

And while we admit that sailor and sailor may lawfully struggle with each other for the plank which can save but one, we think that, if the passenger is on the plank, even the law of necessity justifies not the sailor who takes it from him.

This rule may be deemed a harsh one towards the sailor, who may thus far have done his duty; but when the danger is so extreme that the only hope is in sacrificing either a sailor or a passenger, any alternative is hard; and would it not be the hardest of any to sacrifice a passenger in order to save a supernumerary sailor?

But, in addition: If the sources of the danger have been obvious, and destruction ascertained to be certainly about to arrive, though, at a future time, there should be consultation, and some mode of selection fixed, by which those in equal relations may have equal chance for life. By what mode, then, should selection be made? The question is not without difficulty; nor do we know of any rule prescribed either by statute or by common law, or even by speculative writers on the law of nature.

In fact, no rule of general application can be prescribed for contingencies which are wholly unforeseen. There is, however, one condition of extremity for which all writers have prescribed the same rule. When the ship is in no danger of sinking, but all sustenance is exhausted, and the sacrifice of one person is necessary to appease the hunger of the others, the selection is by lot. This mode is resorted to as the fairest mode; and in some sort, as an appeal to God for selection of the victim. This manner, obviously, was regarded by the mate in parting with the captain, as the one which it was proper to adopt, in case the long-boat could not live with all who were on board on Tuesday morning. The same manner as would appear from the response given to the mate, had already suggested itself to the captain.

For ourselves, we can conceive of no mode so consonant, both to humanity and to justice; and the occasion, we think, must be peculiar, which will dispense with its exercise. If, indeed, the peril be instant and overwhelming, leaving no choice of means, and no moment for deliberation; then, of course, there is no power to consult, to cast lots, or in any such way to decide. But even where the final disaster is thus sudden, if it have been foreseen as certainly about to arrive; if no new cause of danger have arisen to bring on the closing catastrophe; if time have existed to cast lots and to select the victims; then, as we have said, sortition should be adopted. In no other than this, or some like way, are those having equal rights, put upon an equal footing; and in no other way is it possible to guard against partiality and oppression, violence and conflict. What scene, indeed, more horrible, can imagination draw, than a struggle between sailor and sailor, passenger and passenger, or, it may be, a mixed affray, in which, promiscuously, all destroy one another!—this, too, in circumstances which have allowed time to decide, with justice, whose life should be calmly surrendered.

When the selection has been made by lots, the victim yields, of course, to his fate, or, if he resist, force may be employed to coerce submission.

Whether or not “a case of necessity” has arisen, or whether the law, under which death has been inflicted, has been so exercised as to hold the executioner harmless, cannot depend on his own opinion; for no man may pass upon his own conduct, when it concerns the rights, and especially when it affects the lives of others.

We have already stated to you, that, by the law of the land, homicide is, sometimes, justifiable; and the law defines the occasion in which it is so. The transaction, must, therefore, be justified to the law; and the person accused rests under obligations to satisfy those who judicially scrutinize his case, that it really transcended ordinary rules. In fact, any other principle would be followed by pernicious results; and, moreover, would not

be practicable in application. Opinion or belief may be assumed, whether it exist or not ; and if this mere opinion of the sailors will justify *them* in making a sacrifice of the passengers, of course the mere opinion of the passengers would, in turn, justify *these* in making a sacrifice of the sailors. The passengers may have confidence in their own capacity to manage and preserve the boat ; or the effort of either sailors or passengers to save the boat may be clearly unavailing ; and what then, in a struggle against force and numbers, becomes of the safety of the seamen ? Hard as is a seaman's life, would it not become yet more perilous, if the passengers, who may outnumber them ten-fold, should be allowed to judge when the dangers of the sea will justify a sacrifice of life ? We are, therefore, satisfied, that, in requiring proof which shall be satisfactory to *you*, of the existence of the necessity, we are fixing the rule which is not merely the only one that is practicable, but, moreover, the only one that will secure the safety of the sailors themselves.

The Court said, briefly, that the principles which had been laid down by them, as applicable to the crew, applied to the mate likewise ; and that his order, on which much stress had been laid, if an unlawful order, would be no justification to the seamen ; for that, even seamen are not justified in law, by obedience to commands which are unlawful.

The Court added, that the case was one which involved questions of the gravest consideration ; and, as the facts in some sort, were without precedent, that the Court preferred to state the law, in the shape of such general principles as would comprehend the case, under any view which the jury might take of the evidence.

Verdict, GUILTY, with a recommendation to the mercy of the Court.

On the same day a rule was obtained to show cause why a *new trial* should not be granted ; because the Court, instead of telling the jury, that, in a state of imminent and deadly peril, all men are reduced to *a state*

of nature, and that there is, then, no distinction between the rights of sailor and passenger, adopted a contrary doctrine, and charged the jury accordingly.

The defendant subsequently showed cause; but the United States did not reply.

The Court held the application, for some days, under advisement; and, at a subsequent day, *discharged the rule*. They said that, during the trial, (aware that no similar case was recorded in judicial annals), they had given to the subject studious and deliberate consideration; and they had paid like regard to what was now urged. But that, notwithstanding all that had been said, and the arguments, it was admitted, were powerful, no error had been perceived by the Court in its instructions to the jury.

It is true, said the Court, as is known by every one, that we do find in the text writers and in judicial opinions, the phrases, "the law of nature;" "the principles of natural right;" and other expressions of a like signification; but, as applied to civilized men, nothing more can be meant by those expressions, than that there are certain great and fundamental principles of justice, which, in the constitution of nature, lie at the foundation, and make part of all civil law, independently of express adoption or enactment. And to give to the expressions any other signification; to claim them as showing an independent code, and one contrariant to those settled principles which, however modified, make a part of the law in all Christian nations; would be, to make the writers who use the expressions, lay down, as rules of action, principles, which, in their nature, admit of no practicable ascertainment and application. The law of nature forms part of the municipal law; and, in a proper case, as in self-defence, homicide is justifiable, not because the municipal law is subverted by the law of nature, but because no rule of the municipal law makes homicide, in such cases, criminal. It is, said the Court, the municipal or civil law, as thus comprehensive; as founded in moral and social justice; the law of the land,

in short, as existing and administered amongst us and all enlightened nations, that regulates the social duties of—the duties of man towards his neighbor everywhere. Everywhere are civilized men under its protection; everywhere subject to its authority. It is part of the universal law. We cannot escape it in a case where it is applicable; and if, for the decision of any question, the proper rule is to be found in the municipal law, no code can be referred to as annulling its authority.

Varying, however, and however modified, the laws of all civilized nations, and, indeed, the very nature of the social constitution, place sailors and passengers in different relations. And, without stopping to speculate upon over-nice questions not before us, or to involve ourselves in the labyrinth of ethical subtleties, we may safely say, that the sailor's duty, is the protection of the persons entrusted to his care, not their sacrifice,—a duty, we must again declare our opinion, that rests on him in every emergency of his calling; and from which it would be senseless indeed to absolve him exactly at those times when the obligation is most needed.

The prisoner was *sentenced* to solitary confinement at hard labor for six months, and to pay a fine of twenty dollars. *Pardon* was refused by the President, but the penalty was remitted.

J.—CONCERNING THE DEGREE OF CAUTION AND PRUDENCE WHICH A PERSON MUST EXERCISE IN HIS DEFENCE, TO AVOID INJURING THIRD PERSONS.

MORRIS v. PLATT.

[32 CONN., 75.]

Supreme Court of Errors of Connecticut, New Haven, February Term, 1864.

Present: { JOEL HINMAN, *Chief Justice*.
HENRY DUTTON,
THOMAS BELDEN BUTLER, } *Judges*.

ACTING UPON APPEARANCES OF DANGER—INJURING THIRD PERSONS IN LAWFUL SELF-DEFENCE.

1. A man who is assaulted under such circumstances as to authorize a reasonable belief that the assault is made with a design to take his life, or inflict extreme bodily injury, will be justified, both in the civil and the criminal law, if he kill, or attempt to kill, his assailant. [Acc. Sloan's case, *ante*, p. 517, 6th res., and references.]

2. The question, whether the belief was reasonable or not must be passed upon by a jury, but a person does not act in such a case at the peril of making that guilt, if appearances prove false, which would be innocence, if they prove true. [Acc. Sloan's case, *ante*, p. 517, 6th res., and references.]

3. A person who, in his lawful defence, fires a pistol at his antagonist, and accidentally wounds a bystander, is not liable in damages for the injury, if guilty of no negligence. [See note, *sub fin.*]

Trespass for an assault, tried by a jury in the Superior Court, before PARK, J., on the general issue, with notice that the acts were done in lawful self-defence.

On the trial, it was admitted that the plaintiff received the injury complained of, by means of two pistol shots, fired by Delos Platt, one of the defendants. The defend-

ants introduced evidence to prove, and claimed that they had proved, that, at the time of the occurrence, one of the defendants, Sylvester Platt, was assaulted by one Holihan, a brother-in-law of the plaintiff, and that a personal struggle ensued between them; that immediately after, the said Sylvester was surrounded by a large number of the friends of Holihan, among whom was the plaintiff, several of whom had clubs in their hands, and that they joined in the attack upon him, and were beating him upon the head with clubs and fists, to the imminent peril of his life; and that the other defendant, Delos Platt, was a mere bystander, and did not interfere until he saw his brother in great peril, when he attempted to get into the crowd to get him away; that he was immediately struck a severe blow upon the top of his head with a club, which nearly felled him to the ground and partially stunned him; that he immediately turned and ran away to avoid more blows, and was pursued by a number of persons, among whom was the plaintiff, from the crowd that had surrounded Sylvester, several of them being armed with clubs; that he ran about six rods, when he was overtaken by his pursuers and was immediately felled to the ground; that his pursuers surrounded him and beat him upon the head with their fists and clubs, so that his head was severely bruised, and he was in great bodily peril and in danger of losing his life; that while he was upon the ground and being beaten in the manner above stated, he fired the pistol shots at those who were beating him; that the plaintiff was one of the assailants, and received all the injuries complained of while in this attack upon him, from the pistol shots fired by him; and that all that was done by him was done in self-defence, to protect his life and his person from extreme bodily injury. The plaintiff claimed, and offered evidence to prove, that he had nothing to do with the contest between Sylvester Platt and Holihan; that Sylvester commenced the affray; that, although the plaintiff was in the crowd surrounding them after the affray had commenced, he was a mere

bystander, and did not participate in the contest; that Delos, the other defendant, was standing near by in the crowd to assist his brother Sylvester, both being armed with pistols; that when Delos ran from the crowd surrounding Sylvester and Holihan, he ran but a short distance, and drew his pistol while running; that while he was running with his pistol in his hand, he was seized by one Shortell, and a struggle ensued between them; that Delos immediately after fired his pistol, and fired four shots in succession; that the plaintiff did not join in any attack upon him, and did not pursue him at all; that he did not approach him until he had fired two shots, and that he then did so for the purpose of assisting Shortell, who had been hit by one of the shots; that while he was so approaching him, and when near him, Delos fired two shots, one of which wounded him in the jaw, and the other in his breast; that Delos was standing up when he fired the shots; and that the defendants armed themselves previous to the affray for the purpose of commencing a quarrel and using their weapons.

The defendants asked the Court to charge the jury, that if they should find that, at the time of the shooting of the pistol, Delos Platt was being attacked in the manner claimed, and that from the number of his assailants and the weapons used by them, he was in danger of losing his life, or of suffering extreme bodily harm, he would be justified in using a pistol or other deadly weapon in self-defence, provided he had done all in his power to avoid the danger by retreating as far as he could, and had no other means of defence; that a man may lawfully take the life of another who is unlawfully assailing him to his imminent peril of life or of extreme bodily harm; that a man, who in the lawful pursuit of his business, is attacked under circumstances which denote an intention to take away his life, or do him some extreme bodily harm, may lawfully kill the assailant, provided he use all the means in his power to save his own life, or prevent the intended harm, such as retreating as far as he can, or disabling his adversary without killing

him, if it be in his power; that when the attack upon him is so sudden and violent, that a retreat would only increase the danger, he may instantly kill his adversary without retreating at all; and that where, from the nature of the attack, there is a reasonable ground to believe there is a design to destroy life, or commit a felony upon the person, the killing of the assailant will be excusable homicide, though it should afterwards appear that no felony was intended.* The Court did not so charge the jury, but said to them that "the great principle of self-defence is this, that whenever a person assails another, the party assailed may do what is reasonably necessary to defend himself from the attack; that what is reasonably necessary depends upon all the circumstances of the particular case—the character of the attack, the number of the assailants, the weapons used, the danger of the party assailed, together with all the circumstances." And the Court omitted to charge them with regard to the right to take the life of an assailant, where, from the nature of the attack, there is reasonable ground to believe that he intends to take life, or commit a felony upon the person, because the Court did not consider that the facts of the case required such instructions.

The plaintiff claimed and asked the Court to charge the jury, that if, in this case, the defendant, Delos, was lawfully defending himself against the attack of other persons, when he fired the shots that injured the plaintiff, and it was necessary for him to use the pistol in so doing, yet if the plaintiff was not a party to the assault, but was a mere bystander, he would be liable to the plaintiff for all actual damage caused by the pistol shots, though he had no intention of shooting the plaintiff, and did so accidentally, while lawfully exercising his right of self-defence against his assailants. The defendant claimed, and asked the Court to charge the jury, that to render them liable to the plaintiff in this action, there must have been an unlawful intention, or some neg-

* Taken from the three resolutions of Selfridge's case, *ante*, pp. 17, 18.

lect or fault on their part, and that, if the jury should find that there was no intention to shoot the plaintiff or to injure him, and that at the time the defendant, Delos, fired the shots which injured the plaintiff, he was lawfully defending himself against those attacking him, and was wholly free from fault, and justified in firing the pistol in self-defence at those assailing him, and in so doing, wounded the plaintiff accidentally, he being a bystander and having nothing to do with the assault, they would not be liable to the plaintiff for the injury. The Court did not charge the jury as requested by the defendants, but in conformity with the claim of the plaintiff.

The jury returned a verdict for the plaintiff, and the defendants moved for a new trial.

Kellogg, in support of the motion, contended that the Court should have charged that, to render the defendants liable in this action, there must have been *an unlawful intention or some negligence or fault* on their part. In all the cases in the books, where one has been held liable for an accidental or unintentional injury, there was some negligence or fault on his part. 1 Selw., N. P., 28; 2 Greenl. Ev., §§ 85, 94; 1 Hilliard on Torts, ch. 5, § 9; *Brown v. Kendall*, 6 Cush., 292, 295; *Vincent v. Stinehour*, 7 Vt., 62.

H. B. Munson and Doolittle, contra:

1. By the pleadings, the defendants put their case wholly upon the ground of lawful self-defence, and their evidence was directed solely to this point. There is no intimation that the injury was accidental. This being so, they had no right to ask the Court to instruct the jury upon the law as to accidental injuries, and upon a state of facts not presented either by the pleadings or evidence. *Churchill v. Rosebeck*, 15 Conn., 359; 1 Swift Dig., 772.

2. It would be no justification or excuse for the injury to the plaintiff, that the defendant, who fired the pistol, did so with an unlawful intent, or, that, in firing the pis-

tol, he accidentally hit the plaintiff. "When a civil remedy is sought for a forcible injury, the intention of the defendant is not regarded, except for the purpose of enhancing or mitigating damages; and it is deemed just and reasonable, independent of any question of intent, that he by whose act a civil injury has been occasioned, should ultimately sustain the loss which has accrued, rather than another." GOULD, J., in *Myers v. the State*, 1 Conn., 505. "If a man assault me so that I cannot avoid him, and I lift up my staff to defend myself, and, in lifting it up, undesignedly hit another, who is behind me, an action lies by that person against me; and yet I did a lawful act in endeavoring to defend myself." Case put by BRIAN, J., and assented to by CHEKE, Ch. J., and LITTLETON, J., approved also by BLACKSTONE, J., in *Scott v. Shepherd*, 2 Bla. R., 896. The law does not so much regard the *intent* of the act, as the loss and damage of the party suffering. *Bessey v. Olliot*, Raym., 468; *Weaver v. Ward*, Hobart, 134; *James v. Campbell*, 5 Car. & Pay., 372; 2 Greenl. Ev., § 94. Lunatics are liable for a civil injury, and yet they are not capable of having what the law would regard as an intention. The exercise of the right of self-defence, must be limited to the party who assails; to allow a defendant so to exercise this right as to injure an innocent party, would be to hold his person more sacred and valuable than those of other men.

BUTLER, J.—Upon a careful examination of the important questions presented on this record, I do not see how the omission of the Court to charge as requested on the first point, or the charge actually given on the second, can be vindicated, and the verdict sustained.

1. It appears from the evidence offered on the trial, that the defendant wounded the plaintiff in two places, by two shots fired from a pistol, and, from the nature of the weapon, and the other conceded circumstances, the jury were authorized to find, and doubtless did find, that the wounds were inflicted with a design to take the life of the plaintiff. It was incumbent upon the defendant

to justify or excuse their infliction. He, in the first place, attempted to justify them, and the obvious attempt to take life which aggravated them, by offering evidence to prove that he was assailed by the plaintiff and others, in a manner which indicated a design to take his life, and "that he was in great bodily peril, and in danger of losing his life by means of the attack," and that he fired the pistol "to protect his life and body from extreme bodily injury." If these facts were proved and found true, they fully justified the attempt of the defendant to take the life of the plaintiff, as matter of law, and entitled the defendant to a verdict in his favor. And so the Court were bound to tell the jury, if properly requested to do so by the defendant.

The motion further shows, that the defendant did, in substance, request the Court to charge, that, if they found the fact proved as claimed, he would be justified in self-defence, in using the pistol as he did—that the rule of law is, "that a man may lawfully take the life of another who is unlawfully assailing him, if in imminent peril of losing his life, or suffering extreme bodily harm, etc." What a man may lawfully do, he may lawfully attempt to do, and that request embodied, in substance, and with sufficient distinctness, a well-settled specific rule of law, applicable alike in criminal prosecutions and civil suits, and to the facts of the case as claimed.

The Court did not conform to the request. The charge as given, informed the jury what "the great principle" of the law of self-defence is, and correctly; but that was not all to which the defendant was entitled. It is not for juries to apply "great principles" to the particular state of the facts claimed and found, and thus make the law of the case. When the facts are admitted, or proved and found, it is for the Court to say what the law, as applicable to them, is, and whether or not they furnish a defence to the action, or a justification for the injury, if that be the issue. And so, where evidence is offered by either party, to prove a certain state of facts, and the claim is made that they are proved, and the Court is re-

quested to charge the jury what the law is as applicable to them, and what verdict to render if they find them proved, the Court must comply. This is not only the common law rule, but it is carefully and explicitly declared in this State by statute, that, "it shall be the duty of the Court to decide all questions of law arising in the trial of a cause, and, in committing the cause to the jury, to direct them to find accordingly." Rev. Stat. tit. I, § 144.

Here the rule of law applicable to the facts claimed, is as well settled and specific as any rule of law in the books, and it was the duty of the Court to give it to the jury as requested, and direct them, if they found the facts as claimed, to find a verdict accordingly. And if it were otherwise, and a specific rule settled by authoritative adjudications in which the great principle had been applied to a similar state of facts, did not exist, it would still have been the duty of the Court to apply the principle to the facts, and to tell the jury whether or not they furnished a justification, in law, to the defendant, for that, in the language of the statute, was "a question of law arising in the case."

The first request of the defendant, which we are considering, involved the finding of two principal facts, viz: first, whether the plaintiff was one of the assailants, and second, whether the assault was made with the design to take the life of the defendant, or inflict upon him extreme bodily harm. But the jury might find, upon the evidence, that the plaintiff was one of the assailants, and fail to find the design to take life imputed to him. To meet such a contingency, the defendant added to his request, that the Court should charge the jury, "that, when, from the nature of the attack, there is a reasonable ground to believe that there is a design to destroy his life, or commit any felony upon his person, the killing of his assailant will be excusable homicide, though it should afterwards appear that no felony was intended; but the Court did not so charge, because, as the motion states, the Court did not consider that the facts of the case required such instructions.

The facts of a case are to be found by the jury, unless admitted, and the Court can only regard them as claimed, for the purpose of applying the law to them contingently if found. When, therefore, the motion states that the Court did not think that the facts of the case required the instruction claimed, as the material facts were in dispute, it must be intended that the Court was of opinion that there was not any such law as claimed, applicable to the facts as claimed. But in that, the Court were mistaken. A man who is assailed, and under such circumstances as to authorize a reasonable belief that the assault is with design to take his life, or do him extreme bodily injury, which may result in death, will be justified in the eye of the criminal law if he kill his assailant, and in an action of trespass if he unsuccessfully attempt to kill him, and he surviving, brings his action; for the killing would have been lawful, and of course, the attempt lawful; and no man is liable in a civil suit or criminal prosecution, for an injury lawfully committed in self-defence upon an actual assailant. Doubtless, the question whether the belief was reasonable or not, must in either proceeding, be ultimately passed upon by a jury; and the assailed judges at the time upon the force of the circumstances, when he forms and acts upon his belief, at the peril that a jury may think otherwise and hold him guilty. But in the language of Judge BRONSON, in the thoroughly considered case of *Shorter v. The People*,^b 2 Comstock, 193, "he will not act in the peril of making that guilty, if appearances prove false, which would be innocence if they proved true." And such is the law as cited by Judge SWIFT, (2 Swift Dig., 285,) from *Selfridge's case*,^c and as held on a careful review of all the cases in *Shorter v. The People*, and in numerous other cases which may be found cited there, and in *Bishop on Criminal Law*, vol. 2, p. 561, and it is the law of the land. That part of the request of the defendant used the term "excusable" instead of "justifiable" in respect

^b *Ante*, p. 256. ^c *Ante*, p. 18.

to the homicide, and the latter term would have been more accurate. But the import of the request is not materially varied by that, and we cannot intend that it influenced the decision of the Court.

2. The plaintiff, in answer to the defence made, denied that he was an assailant, and claimed that he was a bystander merely, and requested the Court to charge the jury, in substance, that if they so found, he was entitled to recover, although they should also find the defendant to have been lawfully defending himself against his assailants, and the injury to the plaintiff accidental. That request of the plaintiff embodies the unqualified proposition that a man lawfully exercising the right of self-defence, is liable to third persons for *any* and *all* unintentional, accidental, injurious consequences which may happen to them, and the Court so charged the jury. Although there are one or two old cases and some dicta which seem to sustain it, that proposition is not law.

It is well settled in this Court, that a man is not liable, in an action of trespass on the case, for any unintentional, consequential injury resulting from a lawful act, where neither negligence nor folly can be imputed to him, and that the burden of proving the negligence or folly where the act is lawful, is upon the plaintiff. *Burroughs v. Housatonic R. R. Co.*, 15 Conn., 124. Is the rule different in trespass, where the injury is the immediate and direct, though undesigned and accidental result of a lawful act?

In respect to this question, there is some confusion in the books, arising from two causes. First, the decided cases directly involving the point are few, but the question has been very frequently adverted to by way of illustration or argument, in cases where the point was whether case or trespass was the appropriate form of action. Such, with a single exception, were all the cases which the plaintiff has cited on his brief from our own or other reports, in which the dicta originated. In all that large class of cases, the dicta are thus thrown

out *obiter*, and assume the fact, without determining it, that the party is liable in one or the other form of action. See, on this subject, the remarks of SHAW, Ch. J., in *Brown v. Kendall*, 6 Cushing, 295. And in the second place, accidents, cognizable in actions at law, and distinguished from those peculiarly regarded in equitable proceedings, resulting from lawful acts, differ in character, and the distinctions and the right use of terms to characterize them, have not always been sufficiently appreciated or regarded. A careful attention to those distinctions and the authorities, will, I think, enable us to determine the question in hand with entire satisfaction.

An accident is an event or occurrence which happens unexpectedly, from the uncontrollable operations of nature alone, and without human agency; as when a house is stricken and burned by lightning, or blown down by tempest, or an event resulting undesignedly and unexpectedly from human agency alone, or from the joint operations of both; and a classification which will embrace all the cases of any authority, may easily be made.

In the first class are all those which are *inevitable* or absolutely unavoidable, because effected or influenced by the uncontrollable operations of nature; in the second class, those which result from human agency alone, but were *unavoidable under the circumstances*; and, in the third class, those which were *avoidable*, because the act was not called for by any duty or necessity, and the injury resulted from the want of that extraordinary care, which the law reasonably requires of one doing such a lawful act, or because the accident was the result of actual negligence or folly, and might with reasonable care adapted to the exigency, have been avoided. Thus, to illustrate, if A. burn his own house, and thereby the house of B., he is liable to B. for the injury; but if the house of A. is burned by lightning, and thereby the house of B. is burned, A. is not liable; the accident belongs to the first class, and was strictly inevitable or

absolutely unavoidable. And if A. should kindle a fire in a long unused flue in his own house, which has become cracked without his knowledge, and the fire should communicate through the crack and burn his house, and thereby the house of B., the accident would be unavoidable under the circumstances, and belong to the second class. But if A., when he kindled the fire, had reason to suspect that the flue was cracked, and did not examine it, and so was guilty of negligence, or knew that it was cracked, and might endanger his house and that of B., and so was guilty of folly, he would be liable although the act of kindling the fire was a lawful one, and he did not expect or intend that the fire should communicate.

And so to apply these principles to this case; if the defendant had been in the act of firing the pistol at an assailant in lawful self-defence, and a flash of lightning had blinded him at the instant and diverted his aim, or an earthquake had shaken him and produced the same result, or if his aim was perfect but a sudden violent puff of wind had diverted it or the ball after it passed from the pistol, and, in either case, the ball, by reason of the diversion, had hit the plaintiff, the accident would have been so affected in part, by the uncontrollable and unexpected operations of nature as to be inevitable or absolutely unavoidable; and there is no principle or authority which would authorize a recovery by the plaintiff.

And in the second place, if, while in the act of firing the pistol lawfully at an assailant, the defendant was stricken, or the pistol seized or stricken by another assailant, so that its aim was unexpectedly and uncontrollably diverted towards the plaintiff; or if, while in the act of firing with a correct aim, the assailant suddenly and unexpectedly stepped aside, and the ball, passing over the spot, hit the plaintiff, who till then was invisible and his presence unknown to the defendant; or, if the pistol was fired in other respects with all the care which the exigencies of the case required, or the circumstances permitted, the accident was what has

been correctly termed, "unavoidable under the circumstances;" and whether the defendant should in such case be holden liable or not, is the question we have in hand. For, in the third place, if the act of firing the pistol was not lawful, or was an act which the defendant was not required by any necessity or duty to perform, and was attended with possible danger to third persons, which required of him more than ordinary circumspection and care, as if he had been firing at a mark merely; or if the act though strictly lawful and necessary, was done with wantonness, negligence or folly; then, although the wounding was unintentional and accidental, it is conceded and undoubtedly true, that the defendant would be liable.

In this case, the rule of law claimed by the plaintiff, and given by the Court to the jury, authorized them to find a verdict for the plaintiff, if they found the accident to belong to the second class, and to have been "unavoidable under the circumstances." We have seen that if the injury had been consequential and the form of action *case*, the defendant would not have been liable; and the question returns whether he can and should be holden liable, because the injury was direct and immediate, and the form of action is *trespass*. I think not, whether the decision of the question be made upon principle or governed by authority.

If the question is to be settled upon principle, it seems very clear that the form of the action should not be regarded; for the liability of the defendant must be determined by the nature of the accident, whether avoidable or unavoidable under the circumstances, or inevitable, and not by the fact that the injury was direct or consequential. The *foundation* of that liability, in every case of accident, where it is the result of human agency, uninfluenced by the operations of nature, and the act is lawful, is really *negligence*. This is true of collisions between vessels on the water, or horses or vehicles and persons upon the land, which constitute the largest class of cases, for, as the accidents result from steering or driv-

ing, and are, therefore, direct injuries, trespass is the only remedy. So, when a man, in firing at a mark, unintentionally wounds another, the injury is direct, and the form of action is trespass, but the ground of liability is negligence, in doing an unnecessary and avoidable, though lawful act, without that extraordinary degree of care which the law demands in such circumstances, and which would have prevented the accident. As, therefore, the foundation of the liability is the same in both cases, irrespective and independent of the question whether the injury was direct or consequential, there is no question for any distinction in respect to the justification in the two actions.

And to that effect is the current of authority. In England, the dicta cited from Raymond were disregarded by a majority of the Court in *Scott v. Shepherd*, although urged by BLACKSTONE, J., who dissented, and the *decision* is in point for the defendant. No case in point for the plaintiff is cited upon his brief. The case of *James v. Campbell*, 5 Car. & Pay., 372, is not so; for in that case, Campbell, the defendant, and another, were fighting unlawfully, and in breach of the peace, and while thus fighting and attempting to hit his antagonist, Campbell hit the plaintiff, who was a bystander. But there the act was every way avoidable.

Mr. Hilliard, in his work on Torts, vol. 1, ch. 5, §9, so states the law, and cites the English case of *Wakeman v. Robinson*, 1 Bingham, 213, and the case fully sustains him. The action was *trespass* for driving against the house of the plaintiff, and the rule of law recognized by the Court as applicable to the action, is stated in the head-note thus: "If one does an injury by unavoidable accident, an action does not lie; *aliter*, if any blame attaches to him, though he be innocent of any intention to injure." If there be any later case overruling that, it has not been pointed out to us or fallen under our observation. As late as 1860, in the tenth edition of Roscoe's Digest of the Law of Evidence at *Nisi Prius*, that case is cited as law.

In this country, though the cases are few, they are all, so far as we are informed, with the defendant. In the case of *Vincent v. Stinehour*, 7 Vt., 62, which was an action of trespass against the defendant, for driving a horse and sulky against the plaintiff, the defendant claimed that the accident was unavoidable under the circumstances, for that his horse became ungovernable and the injury could not be prevented by prudence and care; and the Supreme Court, in an elaborate opinion, held that a defence. In *Brown v. Kendall*, 6 Cushing, 292, which was an action of assault and battery, the defendant accidentally hit the plaintiff, a bystander, while raising a stick to strike and part two dogs which were fighting. This was the precise case put for the purpose of illustration, by some of the English judges, as cited in the brief of the plaintiff's counsel. Yet the Court in Massachusetts, Chief Justice SHAW giving the opinion, held that the defendant was not liable, "unless the act was done in the want of the exercise of due care, adapted to the exigency of the case; and, therefore, such want of due care became part of the plaintiff's case, and the burden of proof was on the plaintiff to establish it." The same principles are recognized by the Supreme Court of the State of New York, in the case of *Bullock v. Babcock*, 3 Wend., 391, although they were not applied, because that was a case of unavoidable accident, the injury having been inflicted by an arrow, while shooting at a mark without reasonable care. And it is sufficient to add, that the case of *Vincent v. Stinehour*, was cited by Judge WILLIAMS, in giving the opinion in *Burroughs v. Housatonic R. R. Co.*, 15 Conn., 131, with evident approbation; although, as the case did not call for it, the principle involved was not, in terms, adopted. But the broad proposition subsequently stated without qualification in respect to the form of action, that "where there is neither negligence nor folly in doing a lawful act, the party cannot be chargeable with the consequences," tends to show the inclination of his mind; and we cannot doubt, that if the case had

required it, the rule, as settled in *Vincent v. Stinehour*, would have been adopted by the Court.

Such are the general rules of law applicable to accidental injuries, by which we must be governed in deciding the question as raised on the motion. But we are not insensible to the fact, that the danger of accidental injury to third persons, from the use of fire-arms, even in lawful self-defence, is, comparatively, very great; that the bearing of these arms is becoming needlessly general, and their use in populous places and thoroughfares quite too frequent, and that some further protection to the public, from injury by them, seems necessary. That protection might be afforded by us, perhaps, if we should hold, 1st, the use of fire-arms, even in lawful self-defence, to be attended by so much contingent danger to innocent third persons, that accidental injuries by them, should be deemed exceptional, and wholly inexcusable as matter of law, or inexcusable, unless the defendant should show that they were inevitable or absolutely unavoidable; or, 2d, that all such injuries should be deemed *prima facie* negligent, and, that it should be left to the jury to say, whether, in the particular case, the danger of injury to third persons was so slight and improbable, that the case was exceptional, and the defendant wholly free from blame, either in having or using the instrument. It is obvious, however, that if we should thus introduce an exception into the law, to meet new contingencies, we should be going beyond the exigencies of this case (there being other errors,) and encroaching upon the peculiar duties of the legislative branch of the government; and to that branch, with this statement of the condition of the common law, and suggestion in respect to the importance of a remedy, we must leave the matter.

We advise that a new trial be granted.

In this opinion the other Judges concurred.

Judgment reversed.

NOTE.—See a note to this case by Judge Redfield, 4 Am. Law Reg., N. S., 523. This writer suggests, that *Hummach v. White*, 9 Jur., N. S.,

786, has some bearing on the question. The case of *Aaron v. The State*, 31 Ga., 167, however, affords more direct assistance. In this last case, the defendant drew a revolver, intending to use it against one who was about to assail him with a knife; and, while holding it in his hand, not pointed at his antagonist, it accidentally went off and killed a bystander. It was held, that the act of defence being in itself lawful, it only remained to consider whether the defendant, in the use of the weapon, acted with due caution and prudence. If he did, he was not guilty of any crime; if he did not, he was guilty of the lowest grade of manslaughter, viz: involuntary manslaughter in the performance of a lawful act, where due caution or discretion has not been used.

K.—THE LAW OF SELF-DEFENCE APPLIED TO A STATE OF MIXED WAR.

THE PEOPLE v. McLEOD.

[1 HILL, N.Y., 377.]

Supreme Court of New York, July Term, 1841.

SAMUEL NELSON, *Chief Justice*.
 GREENE C. BRONSON, } *Justices*.
 ESEK COWEN,

RIGHT OF SELF-DEFENCE—IMMINENCE OF THE DANGER—SAME, A QUESTION FOR JURY—DEFENCE IN CASES OF PRIVATE OR MIXED WAR.

1. The right of using violence in self-defence, only arises where one is forcibly assailed.

2. To excuse a homicide in self-defence, the act must not be premeditated. [Contra, *Bohannon's case*, *ante*, p. 395.]

3. The right of resorting to force upon the principle of self-defence does not arise while the apprehended mischief exists in machination only; nor does it continue so as to authorize violence by way of retaliation or revenge for a past injury.

4. A force which a party has a right to resist, must itself, be within striking distance; it must be menacing, and apparently able to inflict

physical injury, unless prevented by the resistance which he opposes. [Acc. Rippy's case, *ante*, p. 345; Williams' case, *ante*, p. 349; Wesley's case, *ante*, p. 319; Dyson's case, *ante*, p. 304; Scott's case, *ante*, p. 163; Hinton's case, *ante*, p. 83; Harrison's case, *ante*, p. 71; Contra, Philips' case, *ante*, p. 383; Carico's case, *ante*, p. 389; Bohannon's case, *ante*, p. 395. And see Robert Jackson's case, *ante*, p. 482; Cotton's case, *ante*, p. 316; Patten's case, *post*.]

5. Whether a homicide be justifiable or excusable on the ground of self-defence, or other facts existing at the time, is a question to be determined by a jury, and cannot be determined on an enquiry under a writ of *habeas corpus*. [Acc. Harris' case, *ante*, p. 276, and references.]

6. The foregoing rules limiting the right of defence, apply to a state of mixed, or of private war. We may in such cases resist and repel the foreigner at the instant when he comes violently upon us. But we cannot, without the sovereign's command, either assault him whilst his mischief is only in machination, or revenge ourselves upon him after he hath performed the injury against us. [Puffendorf, B. 2, ch. 5, § 7.]

On *habeas corpus* to discharge the prisoner, Alexander McLeod, from the custody of the sheriff of Niagara county, by whom he was confined in jail. The prisoner having been brought before the Court, it appeared by the sheriff's return to the writ, that he was imprisoned on an indictment for the murder of Amos Durfee, found by the grand jury of that county; that he had been arraigned at the Oyer and Terminer held there, and, after pleading not guilty, was in due form committed for trial. The indictment which was annexed to the return, sufficiently charged the crime upon the prisoner, alleging it to have been committed at a certain town, within the county of Niagara.

On the side of the prisoner, the following affidavit was read:

SUPREME COURT.

Alexander McLeod	}	<i>City and County of New York.—ss.</i>
ads.		
The People.		

Alexander McLeod, the defendant in this cause, being duly sworn, doth depose and say, that he has read the return of the sheriff of the county of Niagara, to the writ of *habeas corpus*, on which this deponent has been brought into this Honorable Court, and in relation to

that return and the facts therein contained, this deponent says:

That in the month of December, 1837, and deponent believes about the middle of said month, a body of men, in number, as deponent believes, about two or three hundred, proceeded from the State of New York, and took forcible and hostile possession of Navy Island, in the Niagara river, and lying within the province of Upper Canada, and there organized and defended themselves, in a warlike manner, against the lawfully constituted authorities of said province, and against the dominion of Her Majesty the Queen of Great Britain, and made war by the discharge of cannon and in other ways, upon Her Majesty's subjects at Chippewa, in said province.

That the said occupants of Navy Island, as deponent is informed and believes to be true, were, to a considerable extent, composed of citizens of the United States, and were commanded by Rensselaer Von Rensselaer, one of such citizens.

That, as said deponent is informed and believes to be true, the said invaders were supported with provisions and arms, and whatever else they had for the purpose of said invasion, chiefly, and deponent believes, exclusively, from the United States, and by citizens or residents thereof.

That the object of this invasion of Her Majesty's territory, as the same was then proclaimed, was to make a revolution in the said province, to cause the same to be separated from the government of Great Britain, and to erect it into a new and independent nation, by force.

That, in order to repel the said invasion, and to prevent the said dismemberment of the British dominions, an army of about 2500 strong was assembled at Chippewa, by the authority and under the direction of the provincial government, as soon after the said invasion, as was practicable.

That, between this army and the occupants of Navy Island, a frequent and sometimes heavy cannonade was kept up.

That, owing to the support which the invaders received from citizens and residents of the United States, the efforts, on the part of the provincial authorities, to dislodge them, were for a long time fruitless—they having retained the possession of the island until about the 16th day of January, 1838.

That, on the 29th day of December, 1837, the steamboat *Caroline*, proceeded from Black Rock or Buffalo, and having, as was alleged and believed, landed a quantity of military stores on Navy Island, commenced plying between said island and Schlosser, in the State of New York, transporting, as deponent has been informed and believes to be true, to the said island, men and provisions, and implements of war, for the support, aid and comfort of those who were there engaged in hostilities against the government of Great Britain.

That, in the afternoon of that day, the said boat made two or three trips between the places last aforesaid.

That, as deponent is informed and believes to be true, the evening following, an expedition of several small boats, and with armed men, was fitted out at Chippewa, by the direction of Col. Allen McNabb, who was lawfully in command of Her Majesty's forces at the last named place, and vested with full authority to do so, and commanded to take the said steamboat by force, wherever found, and to bring her in or destroy her.

That, as deponent has been informed and believes to be true, the persons who composed the said expedition, and who were all subjects of Her Majesty, the Queen of Great Britain, embarked in said boats and started off in search of the *Caroline*, and found her fastened to the dock at Schlosser, and there made a hostile attack upon her, by the use of swords and fire-arms, and, having expelled those who occupied her, destroyed her.

That, as deponent has been informed and believes to be true, the said attack was made between twelve and one o'clock of the morning of the 30th of December.

That, as deponent has been informed and believes to be true, while the persons who composed the said expe-

dition against the *Caroline* were engaged therein, and acting under the orders they had so as aforesaid received, from their superior and commanding officer, one, Amos Durfee, a man then employed on the said steamboat, was killed, by being shot through the head with a pistol or musket ball.

That the said Durfee, as deponent has been informed and believes to be true, was slain by some one of the persons engaged in that expedition, and while thus engaged in accomplishing the objects thereof, and not by any other person, or in any other manner, or at any other time.

That this deponent is indicted in this cause for the crime of murder, in killing the said Durfee, on the occasion aforesaid, and for being an accessory before the fact of such killing, with various individuals, but not for having any agency in the death of said Durfee at any other time or manner, than as being one of the persons who composed and accompanied that expedition.

That as deponent has been informed and believes to be true, the act of destroying the said steamboat, *Caroline*, together with the manner in which the same was done, and the conduct of the persons engaged in it, including the killing of the said Durfee, have since been approved and adopted by the national government of Great Britain, as a necessary act of self-defence, on the part of the authorities of the province of Upper Canada. And that, as this deponent has been informed and believes to be true, the Federal Government of the United States, immediately after the destruction of the *Caroline*, opened a correspondence with the government of Great Britain in relation thereto, and demanded reparation therefor, and that said correspondence has not yet been brought to a close.

And in confirmation of the foregoing statement, this deponent craves leave to refer to the published correspondence between the government of Great Britain and the United States, to the communications of the President of the United States to Congress, and the accom-

panying documents, and to the annexed authenticated extract of a letter from Mr. Fox, Her Britannic Majesty's minister, to the Secretary of State of the United States, together with the authenticated copy of the credentials of Mr. Fox to this Government, also hereunto annexed; and he prays that they may be so taken as part of this, his answer, to the alleged cause of his detention and imprisonment, and as together furnishing the grounds of his claim to be discharged therefrom.

And this deponent further says, that he was not one of the persons engaged in the said expedition against the *Caroline*, nor did he accompany the same, or take any part in it, nor in the killing of the said Amos Durfee; and further saith not.

ALEXANDER McLEOD.

Subscribed and sworn in open Court, etc., before me,

W. P. HALLETT,

Clerk of Supreme Court.

A copy of the credentials of Mr. Fox, and also the extract from Mr. Fox's letter to Mr. Webster, Secretary of State, mentioned in the affidavit, were annexed. The letter was dated March 12th, 1841, and the extract was, as follows:

"Her Majesty's government have had under their consideration the correspondence which took place at Washington, in December last, between the United States Secretary of State, Mr. Forsyth, and the undersigned, comprising two official letters from the undersigned to Mr. Forsyth, dated the 13th and 29th of December, and two official letters from Mr. Forsyth to the undersigned, dated the 26th and 30th of the same month, upon the subject of the arrest and imprisonment of Mr. Alexander McLeod, of Upper Canada, by the authorities of the State of New York, upon a pretended charge of arson and murder, as having been engaged in the capture and destruction of the steamboat *Caroline*, on the 29th day of December, 1837.

"The undersigned is directed, in the first place, to make

known to the government of the United States, that Her Majesty's government entirely approve of the course pursued by the undersigned in that correspondence, and the language adopted by him in the official letter above mentioned. And the undersigned is now instructed again to demand from the Government of the United States, formally, in the name of the British government, the immediate release of Alexander McLeod.

"The grounds upon which the British government make this demand upon the government of the United States, are these: That the transaction, on account of which Mr. McLeod has been arrested, and is to be put upon his trial, was a transaction of a public character, planned and executed by persons duly empowered by Her Majesty's colonial authorities, to take any steps and to do any acts, which might be necessary, for the defence of Her Majesty's territories, and for the protection of Her Majesty's subjects; and that, consequently, those subjects of Her Majesty who engaged in that transaction, were performing an act of public duty, for which they cannot be made personally and individually answerable to the laws and tribunals of any foreign country."

Affidavits were read on the part of the people, materially contradicting that of the prisoner, and tending to show, among other things, that he was present, participating in the attack on the *Caroline*; that he shot Durfee, and afterwards declared that he had done so, at the same time exhibiting a pistol, which, as he averred, had Durfee's blood still upon it.

COWEN, J., after discussing several other questions, said:

But admitting that England might protect a man against our jurisdiction, by saying he did a public act under her authority, does it not behoove her at least to show that she has acted within the limits of her own jurisdiction, especially where she has prescribed them to herself? Shall her declaration inure to deprive us of power where she is exceeding her own? And this brings

me to enquire whether the transaction in question be such as any national right, so far examined, can sanction. She puts herself, as we have seen, on the law of defence and necessity; and nothing is better defined nor more familiar in any system of jurisprudence, than the juncture of circumstances which can alone tolerate the action of that law. A force which the defendant has a right to resist, must itself be in striking distance. It must be menacing, and apparently able to inflict physical injury unless prevented by the resistance which he opposes. The rights of self-defence and the defence of others standing in certain relations to the defender, depend on the same ground; at least they are limited, by the same principle. It will be sufficient, therefore, to enquire of the right so far as as it is strictly personal. All writers concur in the language of Blackstone, 3 Bla. Com., 4, that to warrant its exertion at all, the defender must be forcibly assaulted. He may then repel force by force, because he cannot say to what length of rapine or cruelty the outrage may be carried, unless it were admissible to oppose one violence with another. "But," he adds, "care must be taken that the resistance does not exceed the bounds of *mere defence* and *prevention*; for then the *defender* would himself become the *aggressor*." The condition upon which the right is thus placed, and the limits to which its exercise is confined by this eminent writer, are enough of themselves, when compared with McLeod's affidavit, to destroy all color for saying the case is within that condition, or those limits. The Caroline was not in the act of making an assault on the Canadian shore; she was not in a condition to make one; she had returned from her visit to Navy Island, and was moored in our own waters for the night. Instead of meeting her at the line and repelling force by force, the prisoner and his associates came out under orders to seek her wherever they could find her, and were, in fact, obliged to sail half the width of the Niagara river, after they had entered our territory, in order to reach the boat. They were the assailants; and their at-

tack might have been legally repelled by Durfee, even to the destruction of their lives. The case made by the affidavit is, in principle, this: a man believes that his neighbor is preparing to do him a personal injury. He goes half a mile to his house, breaks the door and kills him in his bed at midnight. On being arraigned, he cites the law of nature; and tells us that he was attacked by his neighbor, and slew him on the principle of mere defence and prevention; or, in the language of the plea of *son assault demense*, "he made an assault upon me, and would then and there have beat me, had I not immediately defended myself against him; wherefore I did then and there defend myself as I lawfully might for the cause aforesaid; and, in doing so, did necessarily and unavoidably beat him, doing him on such occasion no unnecessary damage. And if any damage happened, it was occasioned by his assault and my necessary defence."

To excuse homicide in self-defence, says another English writer, the act *must not be premeditated*. He must first retreat as far as he safely can, to avoid the violence threatened by the party whom he is obliged to kill. The retreat must be with an honest intention to escape; and he must flee as far as he conveniently can by reason of some impediment, or as far as the fierceness of the assault will permit him, and then in his defense, he may kill his adversary. 1 Russ. on Cr., 544.

Such is the law of mixed war, on neutral ground. The books cited are treating of no narrow, technical rule peculiar to the common law; but the law of Nature and of nations, the same everywhere, of such paramount force as no municipal or international law could ever overcome, and intelligible to every living soul. It is easily applied, both as between individuals in civil society and nations at peace. Passing the boundary of *strict*, not fancied necessity, the remedy lies in suit by the State or citizen whose rights have been violated, or by demanding the person of the mischievous fugitive who has broken the criminal law of a foreign sovereign.

Accordingly, Puffendorf, after considering the rights of private war in a state of nature, adds: "But we must by no means allow an equal liberty to the members of civil states. For here, if the adversary be a foreigner, we may resist and repel him any way, at the instant when he comes violently upon us. But we cannot, without the sovereign's command, either assault him whilst his mischief is only in machination, or revenge ourselves upon him after he hath performed the injury against us." Puf. b. 2, ch. 5, § 7. The sovereign's command must, as we have seen, in order to warrant such conduct in his subject, be a denunciation of war.

* * * * *

If he, the defendant, show that he was in truth acting as a soldier in time of public war, the jury will acquit him. The judge will direct them to obey the law of nations, which is undoubtedly a part of the common law. So, if the accused were acting in defence against an individual invader of his country. But, above all things, it is important in the latter case for the jury to enquire, whether his allegation of defence be not false or colorable. They cannot allow as an act of defence, the wilful pursuing even such an enemy, though dictated by sovereign authority, into a country at peace with the sovereign of the accused, seeking out that enemy and taking his life. Such a deed can be nothing but an act of vengeance. It can be nothing but a violation of territory—a violation of the municipal law, the faith of treaties, and the law of nations. The government of the accused may approve, diplomacy may gloze, but a jury can only enquire whether he was a party to the deed, or to any act of illegal violence which he knew would probably endanger human life. If satisfied that he was not, as I sincerely hope they may be, upon the evidence in the case before us, they will then have the pleasant duty to perform of pronouncing him not guilty. But whatever may be their conclusion, we feel the utmost confidence that the prisoner, though a foreigner, will

have no just cause to complain that he has suffered wrong at the hands of an American jury.

At our hands, the prisoner has a right to require an answer upon the facts presented by his papers, whether in law he can properly be holden to a trial. We have had no choice, but to examine and pronounce upon the legal character of those facts, in order to satisfy ourselves of the bearing they might have on the novel and important question submitted. That examination has led to the conclusion that we have no power to discharge the prisoner.

He must, therefore, be remanded, to take his trial in the ordinary forms of law.

Ordered accordingly.

PART II.

DEFENCE OF THE HABITATION.

THE PEOPLE v. RECTOR.

[19 WENDELL, 569.]

*Supreme Court of Judicature of the State of New
York, Utica, July, 1838.*

SAMUEL NELSON, *Chief Justice.*
GREENE C. BRONSON, } *Justices.*
ESEK COWEN,

HOMICIDE—RIOTOUS ATTACK OF HABITATION—EVIDENCE OF PREVIOUS ATTACK AND THREATS.

1. On a trial for murder, where it appeared that the deceased and two companions sought to gain admittance into a house of ill-fame by violence, and against the will of the keeper thereof, who ran out and struck the deceased with a door-bar, from which death ensued, *it was held*, that testimony that threats had been made a week before, by a party of rioters, who had broken into the house and abused the inmates, that they would return some other night and break in again, might be received and submitted to the consideration of the jury, under the instruction of the Court; although *it seems* that for the rejection of such evidence, where it was not shown that the deceased was one of the party who made the threats, a new trial would not be granted. [Acc. Sloan's case, *ante*, p. 516, and references.]

2. BRONSON, J., *dissenting*, was of opinion that this case is very different from *Meade's* case; that the evidence was wholly irrelevant—a mere after-thought, gotten up to distract the jury from the real issue.

Trial for murder. The prisoner was indicted for the murder of Robert Shepherd. The prisoner kept a bawdy house in the city of Albany. On the night of the 11th day of March, 1838, between the hours of twelve and one o'clock, the deceased, and two other persons of the names

of Wilson and Whitney, went to the house of the prisoner. Whitney, being in advance of the others, knocked at the door to gain admittance, and was told by the wife of the prisoner that he could not be admitted. After being so told, the deceased and Wilson came up. Wilson said he would try, and they knocked at the door. The prisoner then appeared at a window, told them they could not be admitted, and refused to open the door. Wilson, who was somewhat intoxicated, replied that he would be damned if he did not think he would come in, and immediately walked away some fifteen or twenty feet to obey a call of nature. It was not fully proved that there was any knocking at the door after Wilson uttered the above expressions; the testimony was contradictory as to the number of knocks given at the door, the loudness of the knocks, and as to the extent of the violence committed at the door; some of the witnesses stating that the knocking and kicking at the door were so violent as to shake the house, which was a wooden building. After Wilson left the door, the deceased and Whitney went off of the stoop in front of the door, and stood on the sidewalk, the deceased in front of the door, and Whitney three or four feet from him. The prisoner came out with the *door-bar* of the door raised over his shoulder, in both his hands, and struck the deceased one blow on the head, and knocked him down. He was taken by his companions to a surgeon's office, and, in the course of the day, died.

The counsel for the prisoner offered to prove that the house of the prisoner had been attacked on Saturday night, a week previous to the transaction in question, by several persons, and broken into, and the inmates very badly abused; and, that they threatened to return some other night soon after, and break in again, if they were not admitted. The counsel avowed that this proof was offered to show that the prisoner *had reason to apprehend violence upon his house* at the time that the deceased and his companions came there, and that that was his reason for using so much force as he did. It had been

before proved by a witness for the prisoner, that of those whom they had admitted as guests at the house of the prisoner, some were riotous. This testimony was also rejected by the Court, and the counsel for the prisoner excepted.

The jury found the prisoner guilty of murder. Exceptions having been taken, the sentence was suspended, and the indictment and bill of exceptions were removed into the Supreme Court of Judicature by *certiorari*. The prisoner was brought up by *habeas corpus*, and an application made in his behalf for a new trial.

H. G. Wheaton and *A. L. Jordan*, for the prisoner; *R. W. Peckham* and *S. Stevens*, for the people.

By COWEN, J.: * * * * The second point made by the prisoner's counsel is, that the Court should have received proof of the riotous breaking of the prisoner's house, the previous Saturday night; that the inmates had then been badly abused, and that the rioters threatened to return another night soon after, and break in if they were not admitted. This was offered to establish a reasonable ground for the prisoner's apprehending the execution of a similar threat, now repeated and attempted, according to some of the evidence, with great violence, and even persevered in, after notice to depart. No doubt the deceased and his companions became trespassers by then remaining and pressing to be admitted. Wilson, who was intoxicated, had departed a short distance; but the deceased and Whitney remained on the walk in front of the house, without having taken any means to allay the alarm in the prisoner's mind, which the jury might have thought had been probably excited. Appearances were equivocal upon the point of design. Wilson had apparently left the place, but this, by the prisoner, might have been read as an errand of assistance to those who remained. Here was a juncture of circumstances which the jury might have thought sufficient ground for real alarm, and an effort for protection by actual violence and a disabling of the assailants. That they had come to a house of ill-fame, accustomed

to receive and entertain rioters, might have been an answering argument. It was not for the prisoner to invite guests to his house in the dead hour of night, and then, under affected apprehension, bully them out of their lives. But, standing as he did, already obnoxious to the indignation of the better part of community, it was a fair enquiry of the jury, would he deepen public execration, without a real cause, by the shedding of human blood? It did not appear that he knew the deceased, and his companions, so as to distinguish them from the previous rioters. The names of these were not put forward in the proposition of the prisoner's counsel; nor perhaps could they be. The proposition was not, therefore, objectionable as being intentionally too short in that respect. I do not understand it to be objected, that real alarm on the part of the prisoner, on apparent though unreal grounds, was not pertinent to the issue. The argument is rather, that the character of the prisoner's house and employment were such that the Court might, *in limine*, say upon such full evidence, that apprehension of danger was a mere pretence. In Meade's case,* Lewin's Cr. Cas., 184, and which is recited at large

* Meade and Belt's case, commonly cited as Meade's case, has been so frequently quoted, that we here give it in full:

Prisoners were indicted for murder. Meade for having shot Law with a pistol, and Belt as having been present, aiding and abetting him.

It appeared that Meade had rendered himself obnoxious to the boatmen at Scarborough, by giving information to the excise, of certain smuggling transactions in which some of them had been engaged; and the boatmen, in revenge, having met with him on the beach, ducked him, and were in the act of throwing him into the sea, when he was rescued by the police. The boatmen, however, as he was going away, called to him that they would come at night and pull his house down. His house was about a mile from Scarborough. In the middle of the night, a great number of persons came about his house, singing songs of menace and using violent language indicating that they had come with no friendly or peaceable intention; and Meade, under an apprehension, as he alleged, that his life and property were in danger, fired a pistol, by which Law, one of the party, was killed. The only evidence against Belt was that he was in the house when the pistol was fired; and a voice having been heard to cry out "fire," it was assumed that it was his voice.

J. Williams and Vernon for the prisoners, endeavored to show that Meade did not fire the pistol until a stone had been thrown by which a window in his house was broken.

in Roscoe's Cr. Ev., 644, 645, Phila. ed., 1836, a like previous threat from the very persons who came, although they made no attack, was submitted by HOLROYD, J., to the jury, to consider whether it did not furnish a reasonable ground for apprehending an attack. There the death was occasioned by firing a loaded pistol. The case at bar presents the same circumstance of alarm one step more remote, the assailant not being identified with the previous rioters. That, *per se*, however, would not so absolutely remove apprehension that the killing could not be referred to it. The jury might have laid no stress upon the circumstance; but I think it should

Per HOLROYD, J., to the jury:—A civil trespass will not excuse the firing a pistol at the trespasser in sudden resentment or anger. If a person takes forcible possession of another man's close, so as to be guilty of a breach of the peace, it is more than a trespass. So, if a man with force invades and enters into the dwelling of another. But a man is not authorized to fire a pistol at every intrusion or invasion of his house. He ought, if he has a reasonable opportunity, to endeavor to remove him without having recourse to the last extremity. But, the making an attack upon a dwelling, and especially at night, the law regards as equivalent to an assault upon a man's person; for a man's house is his castle, and, therefore, in the eye of the law, it is equivalent to an assault. But no words or singing are equivalent to an assault, nor will they authorize an assault in return. If you are satisfied that there was nothing but the song, and no appearance of further violence—if you believe that there was no reasonable ground for apprehending further danger, but that the pistol was fired for the purpose of killing, then it is murder.

There are cases where a person in the heat of blood kills another, that the law does not deem it murder, but lowers the offence to manslaughter; as, where a party coming up by way of making an attack, and without there being any previous apprehension of danger, the party attacked, instead of having recourse to a more reasonable and less violent mode of averting it, having an opportunity so to do, fires on the impulse of the moment. If, in the present case, you are of the opinion that the prisoners were really attacked and that Law and his party were on the point of breaking in, and likely to do so, and execute the threats of the day before, they were, perhaps, justified in firing as they did. If you are of opinion that the prisoners intended to fire over and frighten, then the case is one of *manslaughter*, and not of *self-defence*.

With regard to Belt, there is no evidence one way or the other, whether there was or was not any other person in the house with Meade; although there is no doubt that he was there. You are not, however, to assume in a case where a man's life is at stake, that, because a man's voice was heard, it was the voice of Belt.

The jury found Meade guilty of manslaughter and acquitted Belt.

have been received, because we cannot say they would not. The lightness of a relevant circumstance is no argument for withholding it from the jury. *Rex v. Northampton*, 2 Maule & Selw., 262. In the prosecution of a crime so essentially the creature of intent as murder, everything pertinent should be submitted to the jury, upon which they may infer the absence of malice. The instrument, as used in this case, proved to be most dangerous, but it was not deadly in its own character; and, connected with the prisoner's manner, as described by Gillespie, could the jury have been brought to believe him, the whole might have presented fair matter of argument, on the question whether the resistance offered was out of proportion to the injury, which there was reasonable cause for apprehending. Evidence that the killing was for such a cause, if it would not make out a justifiable or excusable homicide, (2 R. S., 660, §§ 3, 4), would have brought down the crime to the lowest degree of manslaughter. *Ib.*, 662, § 19; and see Roscoe's Cr. Ev., 643, Phila. ed., 1836. It may be proper to observe that, after the prisoner had given notice to the deceased and his companions to depart, his house was, in respect to them, a mere private one; and, in the eye of the law, entitled to the same measure of protection as the house in Meade's case. Any further assault, therefore, or any apprehended assault, might be repelled, upon the same principles as in that case.

* * * * *

By BRONSON, J.: * * * The next exception, in the order in which they were presented by the prisoner's counsel, is that which relates to the rejection of evidence to prove a riot in the prisoner's house, a week before the deceased received the fatal wound. It is important here to notice with accuracy, what facts the prisoner proposed to prove, and the purpose for which the evidence was offered. The bill of exceptions states that an offer was made in the course of the trial, to prove "that the house of the prisoner had been attacked on the Saturday night previous to the transaction in question, by several per-

sons, and broken into, and the inmates very badly abused, and that they then threatened to return some other night soon after and break in again, if they were not admitted." This was the offer: the purpose for which it was made, as stated in the bill of exceptions, was "to show that the prisoner had reason to apprehend violence upon his house, at the time that the deceased and his companions came there, and that was his reason for using so much force as he did." We are referred on this point to Meade's case, 1 Lewin C. C., 184, as cited in Roscoe's Cr. Ev., 645. There are some very important points of difference between that case and the one at bar. In that case, the boatmen, of whom Law, the deceased, seems to have been one, attacked Meade, ducked him, and were in the act of throwing him into the sea, when he was rescued by the police. As Meade was going away, the boatmen threatened him that they would come at night and pull his house down. In the middle of the night, Law and a great number of persons came about Meade's house, singing songs of menace and using violent language. Meade, under an apprehension, as he alleged, that his life and property were in danger, fired a pistol by which Law, one of the party, was killed. Belt was also indicted with Meade, as having been present, aiding and abetting the alleged murder. HOLROYD, J., among other things, said to the jury: "If you are of opinion that the prisoners were *really attacked*, and that Law and his party were on the point of breaking in, or likely to do so, *and execute the threat of the day before*, they were, *perhaps*, justified in firing as they did." In the case at bar, the pretended attack was not made the very next night after the threat of the rioters; a whole week intervened. The attack was not made by a great number of persons; there were only three young men; and the knocking or kicking at the door for admittance was probably nothing more than the prisoner had been accustomed to hear, without any apprehension for the safety of his person or property.

But what is very natural, there is no offer to prove

that either of the three young men was of the party which had committed the riot, or had any connection or acquaintance with the rioters. Nor was there any offer to show that the prisoner supposed or believed, or had any reason to suspect or believe, that either of these three young men had anything to do with the previous disturbance, or the threatened assault on his house. There was no suggestion that either the rioters or the young men were strangers to the prisoner. So far as the offer goes, he may have known very well that the deceased and his companions had nothing to do with the previous disturbance. Surely, there is nothing in Meade's case to warrant the admission of such evidence as the prisoner proposed to give.

It is not improbable that the prisoner knew the persons who had broken into his house, and abused the inmates a week before, especially as the case states that rioters had been admitted as guests in his house. But if he did not know their names, he might be very well able to distinguish between them and the three young men. It was "a clear, moonlight night, very light," when the deceased and his companions went to the house. The prisoner came to the window, and held a conversation with them before he made the attack, in which there was no intimation that he regarded them as rioters, or that they had ever done any act to excite his apprehension. But, aside from the probability, that the prisoner knew the deceased and his companions had nothing to do with the previous assault, the offer did not go far enough to show any connection between the two transactions. Had the evidence been received, it would have furnished no just ground for the inference that the previous riot was at all in the mind of the prisoner, at the time he made the attack. It was a mere after-thought—an attempt to get up and distract the minds of the jury with a collateral question utterly foreign to the point in issue.

The bill of exceptions states the purpose for which the evidence was offered. It was to show that the defendant had reason to apprehend violence upon his house at the

time the deceased and his companions came there, and that that was his reason for using so much force as he did. Here we have the inference which the prisoner wishes to draw from the evidence; and it is worthy of notice that he does not pretend, that the evidence would warrant any inference that violence upon his house was to be apprehended from the deceased and his companions. He only contends that he had reason to expect violence at that time, but does not venture the suggestion that it was to come from the deceased or his fellows. What, then, do this offer and the inference from it come to? The prisoner says, rioters broke into my house a week before, abused the inmates and threatened another attack; therefore, I had reason to apprehend violence upon my house at the time the young men came there—not that I had any reason to expect violence from them, but from the rioters: this is my reason for sallying out of the house, and attacking the deceased with a dangerous weapon. It seems impossible to maintain that the evidence was admissible. The facts, if proved, would not furnish even a colorable pretence for the attack on the deceased. Although it is never necessary that the evidence offered should be conclusive, it is always essential that it should have a direct tendency to establish the point in controversy. A different rule would lead to the most mischievous consequences in trial by jury.

By the CHIEF JUSTICE: My brethren having arrived at different conclusions upon some of the material questions involved in this case, it becomes necessary that I should express my views, which I will proceed briefly to do.

* * * * *

With respect to the exclusion of the evidence on behalf of the prisoner, of a riotous assault upon his dwelling upon the night of the previous Saturday (seven days previous), and of the threat to return and repeat it, it may be proper to say a word. This proof was offered with a view to show that the prisoner had some ground for the apprehension of violence upon his dwelling and

inmates, when the deceased and his companions first appeared and commenced beating at the door; and that, under the influence of it, a degree of resistance was excusable, which might otherwise be considered disproportioned to the actual danger. That the law regards this sort of palliation for an excess of resistance in case of an unlawful assault upon the person or property of the citizen, is not denied; the only question here is, whether the proposed proof brought the case within it. If I had been sitting upon the trial, I would have admitted the evidence; though I cannot but see, looking at the whole case, that it could not possibly have had much effect upon the minds of the jury. If the new trial turned upon it, I might hesitate before granting it. It has already appeared that some of these rioters were subsequently admitted as guests in the house—a fact that goes far to satisfy the mind that no well-founded apprehension existed.

New trial granted, but principally upon other grounds.

CARROLL v. THE STATE.

[23 ALA., 28.]

Supreme Court of Alabama, June Term, 1853.

WILLIAM P. CHILTON, *Chief Justice.*

DAVID G. LIGON,

GEORGE GOLDTHWAITE,

JOHN D. PHELAN,

LYMAN GIBBONS,

} *Associate Justices.*

DEFENCE AGAINST FELONIES—FORCIBLE TRESPASS—DEFENCE AGAINST ASSAULTS IN THE HABITATION—RETREATING—RULE AS TO EXTENT OF PROTECTION OF DWELLING.

1. The rule of common law is, that a man may repel force by force in defence of his person, habitation or property, against one who manifestly endeavors, by violence or surprise, to commit a known felony, such as

rape, robbery, arson, burglary, or the like ; and in these cases, he is not obliged to retreat, but may pursue his adversary until he has freed himself from all danger. [Acc. Selfridge's case, *ante*, pp. 3, 4 ; Collins' case, *ante*, p. 595, note ; Young's case, *ante*, p. 402, note ; Note to Stoffer's case, *ante*, pp. 230 *et seq.* ; Pond's case, *post* ; Patten's case, *post*.]

2. When the law speaks of a *forcible trespass*, it means such a trespass as amounts to a breach of the peace. Entering a man's house after a warning not to enter, is not, if done without force, a breach of the peace.

3. *In other cases*, the law requires the use of every precaution consistent with safety, even to flight itself, before taking life ; unless, indeed, the party assailed has the protection of his house, which excuses him from retreating further ; and this, it seems, is the only difference between assaults upon the *dwelling* and assaults upon the *person*, and that these two classes of assaults, in all other respects, are governed by the same principles. [Acc. Pond's case, next *post*.]

4. The rule as to the extent of protection to the dwelling is, that a mere civil trespass upon a man's house, unaccompanied with such force as to make it a breach of the peace, would not be a provocation which would reduce the killing to manslaughter, if it was done under circumstances from which the law would imply malice, as with a deadly weapon. But in case of trespass with force, it may be murder or manslaughter, according to the circumstances. The owner may resist the entry, but he has no right to kill, unless it be rendered necessary to prevent a felonious destruction of his property, or to defend himself against loss of life or great bodily harm. If he kills when there is not a reasonable ground of apprehension of imminent danger to his person or property, it is manslaughter ; and if done with malice, expressed or implied, it is then murder. [Acc. Pond's case, *post* ; Greschia's case, *post*. And see note following Greschia's case.]

5. It is hence said, that it is not every forcible trespass upon a man's dwelling that will reduce the killing of the trespasser to manslaughter ; and that it is not every species of personal violence, even when offered against a man in his own house, that will have this effect.

6. *Threats* made by the deceased against the prisoner, and *not communicated* to him, are in general, admissible in evidence only when they are so recent as to constitute part of the *res gestæ*. Where the deceased entered the prisoner's house after having been forbidden to do so, but the proof did not disclose that he offered or attempted any personal violence against the prisoner, it was held, that evidence of such uncommunicated threats, was not admissible to show the character of the conduct of the deceased, in entering the house, after he had been warned not to do so. [See Stokes' case, *post*, and references.]

This was an indictment for murder. One witness testified, that the deceased had agreed to live with the prisoner during the year 1851, and was to receive one-third of what was made on the place. Another witness testified, that the deceased had engaged as overseer for

the prisoner during the year 1851, and was to receive a part of the crop as compensation for his services ; and it was also in evidence, that, some four or five days before the deceased was found dead, he and the prisoner met, and the latter stated to the deceased "that he had told him to leave his place before, and he would not do it; that he then told him, if ever he entered his dwelling-house again, after a particular day which he named, he would kill him." It was further in evidence, that, about ten or fifteen days before the deceased was found dead, the prisoner had requested one Skelton to see, the deceased, who was at work in a field, and endeavor to get a settlement with him, and get him to leave the place; that Skelton went, and endeavored to get the deceased to submit to arbitration, his work and the difficulty which had arisen between him and the prisoner—which the deceased refused; that the deceased also refused to leave the place of the prisoner, and said that, if ever the prisoner interfered with him, in any manner, form or shape, he would kill him, or beat him into mince meat, and that the prisoner was informed of this conversation, and of the threats thus made, before the deceased came to his death.

It was also proved, that, on the evening on which the killing occurred, the prisoner took the trunk belonging to the deceased, and carried it and some clothing which belonged to him, to the gate of the prisoner's premises; that the deceased slept in a room of the prisoner's house; and that, on the same evening, the prisoner sent a message to the deceased, to the effect that he wanted him to leave the place, and that, if he ever entered his house again, he would kill him; but this message was not delivered; that, about dark, the deceased came out of the field where he had been at work, to the gate of the prisoner's premises, and was informed by the latter that he wished him to leave the place, and that he then repeated the message which he had sent him; that the deceased said something in reply, which the witness did not understand; that, shortly afterwards, the report of a

gun was heard in the house; and soon after that, the deceased was found dead in the room of the house in which he had been in the habit of sleeping, and into which he had entered five or six feet before he was shot; that his head was resting on the door-sill, his trunk lying across his body, and his feet towards the place where the prisoner was sitting with a gun by his side.

During the trial, the prisoner offered to prove that the deceased had made threats of personal violence against him about a fortnight before the killing occurred, other than those before detailed; but, it appearing that these threats had not been communicated to the prisoner before the killing, they were excluded by the Court, to which ruling the prisoner excepted. The purpose for which these threats were offered, was to show the character of the conduct of the deceased in entering the house after he had been warned not to enter. There was no witness present at the time of the killing, nor was there any evidence of any act of violence done by the deceased after he had entered the house, unless his entry therein under the circumstances, was an act of violence. It was also in evidence, that the deceased was stout and healthy, while the prisoner was old and infirm, and that the character of the former was that of a violent and quarrelsome man.

The prisoner's counsel requested the Court to charge the jury, "that, if they believed from the evidence, that the defendant had notified the deceased not to enter his dwelling-house, and that the deceased was a stout, healthy man, and the defendant a weak and infirm man, and that the deceased had previously threatened that if the defendant interfered with him, in any manner, form or shape, he would kill him, or beat him into mincemeat, and that the defendant knew of such threats, and that the deceased was a violent man, and that, after the deceased was notified not to enter the dwelling-house of the defendant, he did enter it, and that after he had entered the defendant's dwelling-house, and whilst he was in the house, the defendant killed him, under a well

grounded and honest belief, created by all the circumstances, that it was necessary for him to kill the deceased, to protect his possession of his dwelling-house, then the prisoner could not be convicted of murder in either degree;" which charge the Court refused to give, and the prisoner excepted.

Elmore & Yancey, and *N. Harris*, for plaintiffs in error; *P. T. Sayre*, for the Attorney-General, with whom was *Thos. H. Watts*, for the State.

GOLDTHWAITE, J.: We will first consider the questions presented by the refusal of the Court to give the charge requested.

This charge was, in effect, that if the prisoner acted under a well-grounded apprehension, created by all the circumstances, that it was necessary to take the life of the deceased to protect the possession of his own dwelling-house, he could not be convicted of murder in either degree. To ascertain whether this charge asserted a sound legal proposition, as applicable to the evidence, we must first determine the extent and degree of protection which the law affords to the inhabitant of a dwelling-house in maintaining his possession.

Lord Hale says: "If A. fears, upon just grounds, that B. intends to kill him, and is assured that he provides weapons, and lies in wait so to do, yet without an actual assault by B. upon A., or upon his house, to commit that fact, A. may not kill B. by way of prevention; but he must avoid the danger by flight or other means; for a bare fear, though upon a just cause, gives not a man power to take away the life of another, but it must be an actual, inevitable danger of his own life." 1 Hale P. C., 51.

Again: "A. is in possession of the house of B. B. endeavors to enter upon him. A. can neither justify the assault or the beating of B., for B. had the right of entry into the house; But if A. be in possession of a house, and B. as a trespasser enter without title upon him, A. may not beat him, but may quietly lay his hands upon him

to put him out, and if B. resists and assaults A., then A. may justify the beating of him, as of his own assault. But if A. kills him in defence of his house, it is neither justifiable nor within the privilege *se defendendo*, for he entered as a trespasser, and, therefore, it is, at least, common manslaughter;" and he cites Harcourt's case in support of this, who, "being in possession of a house, A, endeavored to enter, and shot an arrow at them within the house, and Harcourt, from within, shot an arrow at those who would have entered, and killed one of the company; which was ruled manslaughter, and not *se defendendo*, because there was no danger to his life from those without." 1 Hale P. C., 485-6.

Mr. East, in his Crown Law, lays down the same doctrine, almost in the words of Lord Hale, and cites Cook's case, reported in Cro. Car., 537, which was where the Sheriff's officer and bailiffs, having civil process against Cook, called to him to open his doors because he had such process; whereupon Cook forbid their entrance; upon which they broke the window, and then came to the door and tried to force it open, breaking off one of the hinges, upon which Cook discharged a musket and killed the officer, and it was held manslaughter. East, Crown Law, 287.

Hawkins says: "Neither can a man justify the killing of another in defence of his house or goods, or even of his person, from a bare private trespass; and, therefore, he that kills another who, claiming a title to his house, attempts to enter it by force, and shoots at it, or that breaks open his windows in order to arrest him, or that persists in breaking his hedges, after he was forbidden, is guilty of manslaughter." Hawkins, 83.

It is to be remarked, that every case cited by these authors, in relation to a homicide committed upon an assault of the dwelling-house, was one of actual, positive force, exceeding a mere trespass; and in the case of the trespasser entering without title, while Lord Hale admits that, in case of resistance and assault, the beating of him may be justified, he says that if A. kills him in de-

fence of his house, it is, *at least*, common manslaughter, for the reason that it was a trespass; but we are nowhere told, that taking life upon an assault is less culpable, under the same circumstances, than the same act upon an assault of the person. The rule of the common law is, that a man may repel force by force in defence of his person, habitation or property, against one who manifestly endeavors, by *violence or surprise*, to commit a known felony, such as rape, robbery, arson, burglary, or the like; and in these cases he is not obliged to retreat, but may pursue his adversary until he has freed himself from all danger. 1 East, P. C., 271-2; Foster, 271. In other cases, the law requires the use of every precaution consistent with safety, even to flight itself, before taking life; unless, indeed, the party has the protection of his house, which excuses him from retreating further. 1 Hale, 484; 1 Russ., 545; and this, we think, is the only difference between assaults upon the dwelling and upon the person, but that, in all other respects, they are governed by the same principles. The law laid down in the case of Meade,* 1 Lewin, C. C., 184, tends very strongly to support the views we have expressed. There, a number of persons who had abused Meade during the day, came in the night to his house, singing songs of menace and using violent language, indicating that they had come with no friendly or peaceable intention, and Meade, under the apprehension, as he alleged, that his life and property were in danger, fired a pistol, by which one of the party was killed. HOLROYD, J., told the jury, "that a civil trespass will not excuse the firing of a pistol at a trespasser, in sudden resentment or in anger. If a person takes forcible possession of another's close, so as to be guilty of a breach of the peace, it is more than a trespass. So, if a man with force invades and enters the dwelling of another. But a man is not authorized to fire a pistol on every invasion or intrusion of his house. He ought, if he has a reasonable opportunity, to endeavor to remove him, without having recourse to the last ex-

* *Ante*, p. 798, note.

tremity. But, the making of an attack upon a man's dwelling, and especially in the night, the law regards as equivalent to an assault upon a man's person; for a man's house is his castle, and, therefore, in the eye of the law, it is equivalent to an assault; but no words and singing are an assault, nor will they authorize an assault in return."

Our conclusion is, that a mere civil trespass upon a man's house, unaccompanied with such force as to make it a breach of the peace, would not be a provocation which would reduce the killing to manslaughter, if it was done under circumstances, from which the law would imply malice, as with a deadly weapon. For trespass with force, it may be murder or manslaughter, according to the circumstances. The owner may resist the entry, but he has no right to kill, unless it be rendered necessary, to prevent a felonious destruction of his property, or to defend himself against loss of life, or great bodily harm. If he kills when there is not a reasonable ground of apprehension of immediate danger to his person or property, it is manslaughter; and if done with malice, express or implied, it is then murder.

The rule as to the extent of protection to the dwelling, being ascertained, there is but little difficulty in its application to the facts as stated upon the record. It is conceded most fully, that, if the evidence shows an assault upon the house, or the person, under circumstances which would create a reasonable apprehension—that is, a just apprehension in the mind of a reasonable man—of the design to commit a felony with force, or to inflict a personal injury which might result in loss of life or great bodily harm, the danger of the design being carried into execution being imminent and present, the person in whose mind such an apprehension is induced, and over whose person or property, such danger is impending, may lawfully act upon appearances and kill the assailant. The law, in such a case, would not require that the danger should be real—that the peril should actually exist; but it does require that the

appearances should be such as would excite a reasonable apprehension of such peril; and if such appearances do not exist, the killing would be either murder or manslaughter.

Assuming, therefore, that the deceased came to his death by the act of the prisoner, and by the use of a deadly weapon, and in the aspect of the case as presented by the charge requested, the question is simply whether the act was done under the necessity, real or apparent, which the law requires. If it was not, it follows necessarily that the prisoner was guilty either of murder or manslaughter; and if there was any evidence which tended to show that such necessity existed, the charge requested should have been given. Without referring to the evidence in detail, it is sufficient to observe, that the bill of exceptions shows that none was offered of any act of violence on the part of the deceased, either in making the entry into the house, or after it had been made, unless the entry itself, after he had been warned not to enter, might be regarded as an act of violence. When the law speaks of a forcible trespass, it means such a trespass as would amount to a breach of the peace. Entering the house after a warning had been given, would have aggravated the trespass; but, if done without force, it would not have been a breach of the peace. The whole evidence, therefore, consisted of the previous threats made by the deceased, and the trespass committed by him. The threats, however, did not change the character of the trespass, and convert it into a trespass with force. We have seen that, although a forcible trespass upon the dwelling-house may, in some cases, authorize the killing of the assailant, yet it is not every invasion even of this character upon a man's dwelling, which will reduce the killing to manslaughter. The charge requested referred solely to the right of the prisoner to protect the possession of his house, and the circumstances, therefore, must tend to prove a reasonable apprehension on his part of the existence of such a state of facts, as would relieve him from the crime of

murder. Taken in connection with the evidence, then, the charge asserted the proposition, that where the evidence established only a trespass without force, it tended to create a reasonable apprehension, not only that it was committed with force, but under such circumstances as would be sufficient to reduce the killing to manslaughter. We think there was no error in the refusal of this charge.

In relation to the threats of personal violence, made by the deceased towards the prisoner, which were excluded, we also think there was no error. The record shows they were not communicated to the prisoner, and we cannot therefore regard his action as having been influenced by them. But it is urged, these were admissible to show the character of the conduct of the deceased, in entering the house after he had been warned not to do so. The utmost that the threats could show in this aspect was, that the deceased entered the house of the prisoner, with the intention of inflicting personal violence upon him, but the record does not show that any such violence was offered or attempted; besides, we are not informed as to the precise character of the threats, and it is not every species of personal violence, even when offered against a man in his own house, that will reduce a homicide to the offence of manslaughter, when committed with a deadly weapon. Declarations of this character can, in general, only be received, when they constitute part of the *res gestæ*; and as they were made a fortnight before the fact to which they referred, they were not admissible on this ground.

* * * * *

There is no error in the record, and the judgment is affirmed.

Judgment affirmed.

POND v. THE PEOPLE.

[8 MICH., 150.]

*Supreme Court of Michigan, April Term, 1860, at Detroit.*GEORGE MARTIN, *Chief Justice.*

RANDOLPH MANNING,	} <i>Associate Justices.</i>
ISAAC P. CHRISTIANOY,	
JAMES V. CAMPBELL,	

HOMICIDE—APPEARANCES OF DANGER—EXCUSABLE HOMICIDE—RETREATING TO THE WALL—ASSAULT IN HABITATION—SECRET FELONIES—DEFENCE AGAINST FORCIBLE FELONIES—COMMON LAW AND STATUTORY FELONIES—SUPPRESSING RIOTS—DEFENCE OF SERVANT—HABITATION—OUT-BUILDING.

1. The law does not require the necessity for taking life, to be one arising out of actual and imminent danger, in order to excuse the slayer; but he may act upon a belief, arising from appearances which give him reasonable cause for it, that the danger is actual and imminent, although he may turn out to be mistaken. The guilt of the accused must depend upon the circumstances as they appear to him, and he will not be held responsible for a knowledge of the facts, unless his ignorance arises from fault or negligence. [Acc. *Morris v. Platt*, *ante*, p. 768; *Sloan's case*, *ante*, p. 517, 6th res. and references.]

2. Homicide *se defendendo* is excusable at common law, when it occurs in a sudden affray, or in repelling an assault, not made with a felonious design.

3. In these cases, the original assault not being with a felonious intent, and the danger arising in the heat of blood on one or both sides, the homicide is not excused, unless the slayer does all which is reasonably in his power to avoid the necessity of extreme resistance, by retreating where retreat is safe, or by any other expedient which is attainable. He is bound, if possible, to get out of his adversary's way, and he has no right to stand up and resist, if he can safely retreat or escape. He must retreat as far as he can; and when, by reason of intervening impediments or the fierceness of the assault, he can retreat no further without manifest danger of death or great bodily harm, he may turn and kill his assailant; and if he can make it appear to the jury that the killing was *necessary* to protect his own life, or to protect himself from serious bodily harm, and that he did all he could to avoid it, he will be justified. [See, on the doctrine of "retreating to the wall," note to *Selfridge's case*, *ante*, pp. 28 *et seq.* and note, p. 139.]

4. A man is not, however, obliged to retreat if assailed in his dwelling, but may use such means as are absolutely necessary to repel the assailant

from his house or to prevent his forcible entry, even to the taking of life. But here, as in other cases, he must not take life, if he can otherwise repel the assailant. [Acc. Carroll's case, *ante*, last case; Greschia's case, *post*.]

5. Where the assault or breaking is *felonious*, the homicide becomes *justifiable*, and not merely *excusable*. But the essential difference between excusable and justifiable homicide rests not merely in the fact that at common law the one was felonious, although pardoned of course, while the other was innocent. Those only were justifiable homicides where the slayer was regarded as promoting justice, and performing a public duty; and the question of personal danger did not necessarily arise, although it does generally. [Upon the distinction between justifiable and excusable homicide, see Selfridge's case, *ante*, p. 16, note.]

6. It is the *duty* of every one who sees a felony attempted by violence, to prevent it, if possible; and in the performance of this duty, which is an active one, there is a legal right to use all necessary means to make the resistance effectual. [Acc. Dill's case, *ante*, p. 738, and note.]

7. But where the felonious act is not of a forcible and violent character, as in picking pockets, and crimes partaking of fraud rather than force, there is no necessity for taking life, and consequently no justification, unless possibly in some exceptional cases. [See *ante*, p. 755, note b.]

8. If any *forcible* attempt is made with a felonious intent against person or property, the person resisting is not obliged to retreat, but may pursue his adversary, if necessary, until he finds himself out of danger. But life may not properly be taken under this rule, where the evil may be prevented by other means, within the power of the person who interferes against the felon. Reasonable apprehension, however, is sufficient here precisely as in all other cases. [As to retreating, see note to Selfridge's case, *ante*, pp. 28 *et seq.*; James D. Kennedy's case, *ante*, p. 137 and note. As to the right to pursue, see *ante*, pp. 230 *et seq.*, note; Carroll's case, *ante*, last case and references.]

9. There is no distinction between common law and statutory felonies, with respect to the rule which justifies homicide in preventing their commission; but in both cases, the felony attempted must be of a forcible and violent character. [See Gray v. Coombs, *post*.]

10. Private persons may forcibly interfere to suppress a riot, and may justify homicide in so doing; although a riot is not necessarily a felony. [Acc. *Respublica v. Montgomery*, 1 Yeates 421.]

11. A man may defend his family, his servants or his master, wherever he may defend himself. [Acc. the authorities cited in note to Biggs' case, *ante*, p. 750.]

12. A building thirty-six feet distant from a man's house, used for preserving the nets employed in the owner's ordinary occupation of a fisherman, and also as a permanent dormitory for his servants, is in law a part of his dwelling, though not included with the house by a fence; and a homicide which was necessary to prevent the forcible destruction of such a building, is justifiable. A fence is not necessary to include buildings within the curtilage, if within a space no larger than that usually occupied for the purposes of the dwelling and customary out-buildings.

The plaintiff in error was tried for the murder of Isaac Blanchard, and convicted of manslaughter. The original reporter has stated the facts with commendable patience and attention to details. These we are obliged for want of space to omit, and refer the reader to the very fair summary given in the opinion of the Court.

The defendant was a fisherman at Seul Choix, a point of land extending into Lake Michigan. The house which the rabble were tearing down at the time of the homicide, was made of boards fastened to posts set in the ground, and covered with bark. It was thirty-six feet from the main house in which Pond and his family lived. It was used for preserving his nets when not in use, and his two hired men, Whitney and Cull, slept regularly therein.

Buel and Trowbridge, for the plaintiff in error; *T. M. Howard*, Attorney-General, for The People.

CAMPBELL, J., delivered the opinion of the Court:

The defence of this case, as presented in the Court below, was based upon a claim, that the accused was only chargeable with excusable or justifiable homicide. And as most of the questions raised before us involve the consideration of the same subject, it may be necessary to examine somewhat carefully into the rules which divide homicide into its various heads, and determine the character of each act of slaying.

The facts are claimed, by the counsel for the accused, to have a tendency to establish the act as innocent on various grounds: *first*, as excusable in defence of himself or his servant; *second*, as justifiable in repelling a riotous attack; and, *third*, as justifiable in resisting a felony.

The first enquiry necessary, is one which applies equally to all of the grounds of defence; and it is, whether the necessity of taking life, in order to excuse or justify the slayer, must be one arising out of actual and imminent danger; or, whether he may act upon a belief, arising from appearances which give him reason-

able cause for it, that the danger is actual and imminent, although he may turn out to be mistaken.

Human life is not to be lightly disregarded, and the law will not permit it to be destroyed unless upon urgent occasion. But the rules which make it excusable or justifiable to destroy it under some circumstances, are really meant to ensure its general protection. They are designed to prevent reckless and wicked men from assailing peaceable members of society, by exposing them to the danger of fatal resistance at the hands of those whom they wantonly attack, and put in peril or fear of great injury or death. And such rules, in order to be of any value, must be in some reasonable degree accommodated to human character and necessity. They should not be allowed to entrap or mislead those whose misfortunes compel a resort to them. Were a man charged with crime, to be held to a knowledge of all facts precisely as they are, there could be few cases in which the most innocent intention or honest zeal could justify or excuse homicide. The jury, by a careful sifting of witnesses on both sides, in cold blood, and aided by the commands of court and counsel, may arrive at a tolerably just conclusion on the circumstances of an assault. But the prisoner, who is to justify himself, can hardly be expected to be entirely cool in a deadly affray, or in all cases to have great courage or large intellect; and can not well see the true meaning of all that occurs at the time; while he can know nothing whatever concerning what has occurred elsewhere, or concerning the designs of his assailants, any more than can be inferred from appearances. And the law, while it will not generally excuse mistakes of law (because every man is bound to know that), does not hold men responsible for a knowledge of facts, unless their ignorance arises from fault or negligence.

A criminal intent is a necessary ingredient of every crime. And, therefore, it is well remarked by Baron PARKE, in *Regina v. Thurborn*, 2 C. & K., 832, that, "as the rule of law, founded on justice and reason, is, that

actus non facit reum nisi mens sit rea, the guilt of the accused must depend on the circumstances as they appear to him." And Mr. Bishop has expressed the same rule very clearly, by declaring that, "in all cases where a party, without fault or carelessness, is misled concerning facts, and acts as he would be justified in doing if the facts were what he believed them to be, he is legally, as he is morally, innocent." 1 Bish. Cr. L., § 242.

These principles have always been recognized, and are sustained by numerous authorities; but they need no vindication, and a further citation would add nothing to the clear and intelligible statements already referred to. And from an examination of some of the charges given, we are very much inclined to believe that the Court below entertained the same views, at least as to some branches of the defence. But as some of the charges actually given, and particularly those in response to the first and second instructions requested, negative this rule, and the jury upon those must have been misled, we must regard these charges as erroneous, unless they were inapplicable to the case altogether. Their applicability will be presently considered.

In order to determine the materiality of the questions of law raised, it becomes necessary to determine under what circumstances homicide is excusable or justifiable. In doing this, it will be proper to advert merely to those instances, which may be regarded as coming nearest to the circumstances of the case before us. The other cases we are not called upon to define or consider, and what we say is to be interpreted by the case before us.

The only variety of excusable homicide (as contradistinguished from justifiable homicide at common law) which we need advert to, is that which is technically termed homicide *se aut sua defendendo*, and which embraces the defence of one's own life, or that of his family, relatives or dependants, within those relations where the law permits the defence of others as of one's self. Practically, so far as punishment is concerned, there is no distinction with us between excusable and justifiable

homicide; but a resort to common law distinctions will, nevertheless, be convenient, in order to illustrate the difference between the various instances of homicide in repelling assaults, according as they are or are not felonious. Homicide *se defendendo* was excusable at common law, when it occurred in a sudden affray, or in repelling an attack not made with a felonious design. According to Mr. Hawkins, it was excusable and not justifiable, because, occurring in a quarrel, it generally assumed some fault on both sides. Hawk. P. C., B. 1, ch. 28, § 24. In these cases, the original assault not being with a felonious intent, and the danger arising in the heat of blood on one or both sides, the homicide is not excused, unless the slayer does all which is reasonably in his power, to avoid the necessity of extreme resistance, by retreating where retreat is safe, or by any other expedient which is attainable. He is bound, if possible, to get out of his adversary's way, and has no right to stand up and resist, if he can safely retreat or escape. See 2 Bish. Cr. L., §§ 543 to 552, 560 to 562, 564 to 568; People v. Sullivan, 3 Seld.,* 396; 1 Russ. Cr., 660, *et seq.* Mr. Russell lays down the rule very concisely, as follows: "The party assaulted must therefore flee as far as he conveniently can, either by reason of some wall, ditch or other impediment, or as far as the fierceness of the assault will permit him; for it may be so fierce as not to allow him to yield a step without manifest danger of his life or great bodily harm, and then, in his defence, he may kill his assailant instantly. Before a person can avail himself of the defence that he used a weapon in defence of his life, he must satisfy the jury that the defence was necessary; that he did all he could to avoid it; and that it was necessary to protect his own life, or to protect himself from such serious bodily harm, as would give him a reasonable apprehension that his life was in imminent danger. If he used the weapon, having no other means of resistance, and no means of escape, in such case, if he retreated as far as he could, he

* *Ante*, p. 65.

would be justified." A man may defend his family, his servants or his master, whenever he may defend himself. How much further this mutual right exists, it is unnecessary in this case to consider. See 2 Bish. Cr. Law, § 581, and cases cited; 1 Russ. Cr., 662; 4 Bla. Com., 184.

There are many curious and nice questions, concerning the extent of the right of self-defence where the assailed party is in fault. But as neither Pond nor Cull were in any way to blame in bringing about the events of Friday night, which led to the shooting of Blanchard, it is not important to examine them. The danger to be resisted must be to life, or of serious bodily harm of a permanent character; and it must be unavoidable by other means. Of course, we refer to means within the power of the slayer, so far as he is able to judge from the circumstances as they appear to him at the time.

A man is not, however, obliged to retreat if assaulted in his dwelling, but may use such means as are absolutely necessary to repel the assailant from his house, or to prevent his forcible entry, even to the taking of life. But here, as in the other cases, he must not take life if he can otherwise arrest or repel the assailant. 2 Bish. Cr. L., §569; 3 Greenl. Ev., §117; Hawk. P. C., book 1, ch. 28, §23. Where the assault or breaking is felonious, the homicide becomes justifiable, and not merely excusable.

The essential difference between excusable and justifiable homicide, rests not merely in the fact that at common law the one was felonious, although pardoned of course, while the other was innocent. Those only were justifiable homicides, where the slayer was regarded as promoting justice, and performing a public duty; and the question of personal danger did not necessarily arise, although it does generally.

It is held to be the duty of every one who sees a felony attempted by violence, to prevent it if possible; and in the performance of this duty, which is an active one, there is a legal right to use all necessary means to make the resistance effectual. Where a felonious act is

not of a violent or forcible character, as in picking pockets, and crimes partaking of fraud rather than force, there is no necessity, and therefore, no justification for homicide, unless possibly, in some exceptional cases. The rule extends only to cases of felony; and in these it is lawful to resist force by force. If any forcible attempt is made with a felonious intent against person or property, the person resisting is not obliged to retreat, but may pursue his adversary, if necessary, till he finds himself out of danger. Life may not properly be taken under this rule, where the evil may be prevented by other means within the power of the person who interferes against the felon. Reasonable apprehension, however, is sufficient here, precisely as in all other cases.

It has also been laid down by the authorities, that private persons may forcibly interfere to suppress a riot or resist rioters, although a riot is not necessarily a felony in itself. This is owing to the nature of the offence, which requires the combination of three or more persons, assembling together and actually accomplishing some object calculated to terrify others. Private persons who cannot otherwise suppress them, or defend themselves from them, may justify homicide in killing them, as it is their right and duty to aid in preserving the peace. And, perhaps, no case can arise where a felonious attempt by a single individual, will be as likely to inspire terror as the turbulent acts of rioters. And a very limited knowledge of human nature is sufficient to inform us, that when men combine to do an injury to the person or property of others, of such a nature as to involve excitement and provoke resistance, they are not likely to stop at half-way measures, or to scan closely the dividing line between felonies and misdemeanors. But when the act they meditate is in itself felonious, and of a violent character, it is manifest that strong measures will generally be required for their effectual suppression; and a man who defends himself, his family or his property, under such circumstances, is justified in making as complete a defence as is necessary.

When we look at the facts of this case, we find very strong circumstances to bring the act of Pond within each of the defences we have referred to. Without stopping to recapitulate the testimony in full or in detail, we have these leading features presented. Without any cause or provocation given by Pond, we find Plant, Robilliard and Blanchard, combining with an expressed intention to do him personal violence. On Thursday evening, this gang, with from fifteen to twenty associates, having been hunting for Pond, found him at a neighbor's, and having got him out of doors, surrounded him, while Plant struck him with his fist, and kicked him in the breast, with insulting language, evidently designed to draw him into a fight. He escaped from them and ran away into the woods, and succeeded in avoiding them that night. That same night, they tore down the door of the net-house, where his servants were asleep, in search of him; and not finding him there, went to the house; the whole rabble being with them; and wanted Pond, and expressed themselves determined to have him, but refused to tell his wife what they wanted of him. Not finding him there, they started off elsewhere in search of him. This was between nine and ten o'clock at night. About noon of Friday, Plant and Blanchard met Pond, when Plant threatened again to whip him; and then went up to him, told him not to say anything, and that if he did, he would give him slaps or kicks. Plant then took a stone in his hand, and threatened if Pond spoke, to throw it at him. Pond said nothing, but went home quietly, and Plant went off and was heard making further threats soon after. Friday night, neither Pond nor his family went to bed, being in fear of violence. Between one and two o'clock that night, Plant, Robilliard, and Blanchard went to the next house, and partially tore it down, while Whitney and Cull were in it. They then went to the house where Pond, his wife and children were, shook the door, and said they wanted Pond. Pond concealed himself under the bed, and his wife demanded what they wanted of him, saying he was

not there; when Plant shook the door again, and ordered Mrs. Pond to open it; saying they wanted to search the house. She refusing, they resorted to artifice, asking for various articles of food, and objecting to receiving them except through the door. Plant then repeatedly commanded her to open the door, saying if she did not, she would regret it. On opening the door from six to twelve inches, by sliding the cord, to hand them some sugar, which they demanded, they did not take the sugar, but Plant seized Mrs. Pond's arm, and squeezed it until she fainted. Not succeeding in getting into the house, they then left for Ward's, and Pond went to the house of his brother-in-law, and borrowed a double-barrelled shot-gun, loaded with pigeon shot, and returned home. While at Ward's, Blanchard told the latter that they had torn down part of Pond's net-house, and had left the rest, so that when they went back they would have the rest of the fun. Blanchard also said, "I want to see Gust. Pond: he abused an Irishman, and I want to abuse him just as bad as he abused the Irishman. Pond has to be abused any way." He also said to Ward, "this is good bread; I don't know but it may be the last piece of bread I'll eat." Plant also made threats. A short time after returning, they were heard to say they were going back again; were going to find him and to whip him, or have the soul out of him. It is to be remarked, that we have this language as rendered by an interpreter, who was evidently illiterate, or at least incompetent to translate into very good English; and it is impossible for us to determine the exact force of what was said. The party then went back to Pond's, and asked admittance to search for him. His wife refused to let them in. They immediately went to the net-house, where Cull was asleep. Plant seized Cull, and pulled him out of bed on the floor, and began choking him. Cull demanded who it was, but received no answer. Blanchard and Robilliard had commenced tearing down the boards. Pond went to the door and hallooed, "Who is tearing down my net-house?" to which there was no answer. The

voices of a woman and child were heard crying, and the woman's voice was heard twice to cry out, "For God's sake!" Cull's voice was also heard from the net-house, not speaking, but hallooing as if he was in pain. Pond cried out loudly, "Leave, or I'll shoot." The noise continuing, he gave the same warning again, and in a few seconds shot off one barrel of the gun. Blanchard was found dead the next morning. Pond took immediate steps to surrender himself to justice.

A question was raised, whether the net-house was a dwelling or a part of the dwelling of Pond. We think it was. It was near the other building, and was used, not only for preserving the nets which were used in the ordinary occupation of Pond, as a fisherman, but also as a permanent dormitory for his servants. It was held in the *People v. Taylor*, 2 Mich., 250, that a fence was not necessary to include buildings within the curtilage, if within a space no larger than that usually occupied for the purposes of the dwelling and customary out-buildings. It is a very common thing in the newer parts of the country, where, from the nature of the materials used, a large building is not readily made, to have two or more small buildings, with one or two rooms in each, instead of a large building divided into apartments.

We cannot, upon a consideration of the facts manifest from the bill of exceptions, regard the charges asked by the defence, as abstract or inapplicable to the case. It was for the jury to consider the whole chain of proof; but if they believed the evidence as spread out upon the case, we feel constrained to say that there are very few of the precedents, which have shown stronger grounds of justification than those which are found here. Instead of reckless ferocity, the facts display a very commendable moderation.

Apart from its character as a dwelling, which was denied by the court below, the attack upon the net-house for the purpose of destroying it, was a violent and forcible felony. And the fact that it is a statutory, and not a common law felony, does not, in our view, change its

character. Rape and many other of the most atrocious felonious assaults, are statutory felonies only, and yet no one ever doubted the right to resist them unto death. And a breaking into a house with the design of stealing the most trifling article, being common law burglary, was likewise allowed to be resisted in like manner, if necessary. We think there is no reason for making any distinctions between common law and statute felonies in this respect, if they are forcible and violent. So far as the manifest danger to Pond himself, and to Cull, is concerned the justification would fall within the common law.

It is claimed by the prisoner's counsel, that we are authorized to pronounce upon the judgment which the facts warrant. Had the facts spread out in the bill of exceptions been found as a special verdict by the jury, this would be true. But as the case stands, we can only consider them as bearing upon the instructions given or refused. The errors being in the rulings, and not in the record outside the bill of exceptions, we can do nothing more, in reversing the judgment, than to order a new trial. The District Judge has ruled upon the law questions in such a way, as to present them all fairly as questions not before decided in this State. We think there was error in requiring the actual, instead of apparent and reasonably founded causes of apprehension of injury; in holding that the protection of the net-house could not be made by using a dangerous weapon; and that the conduct of the assailing party was not felonious; and also in using language calculated to mislead the jury upon the means and extent of resistance justifiable in resisting a felony.

We do not deem it necessary to pass upon the minor points, as we do not suppose the authorities will deem it important to proceed further, unless the facts are very different from those presented.

The judgment below must be reversed and a new trial granted.

MANNING and CHRISTIANCY, JJ., concurred.

MARTIN, Ch. J., concurred in the result.

PATTEN v. THE PEOPLE.

[18 MICH. 314.]

*Supreme Court of Michigan, April Term, 1869.*THOMAS M. COOLEY, *Chief Justice.*

ISAAC P. CHRISTIANCY, }

JAMES V. CAMPBELL, }

BENJAMIN F. GRAVES, }

Associate Justices.

RIOTOUS ATTACK UPON HABITATION—EVIDENCE—RES GESTÆ—JUSTIFIABLE
HOMICIDE—DEFENCE OF PARENT BY CHILD—APPEARANCES OF DAN-
GER—KILLING IN DEFENCE OF HABITATION.

1. On a trial for homicide, where it appeared that the riotous assembly (of which the deceased was one) gathered at the time, grew out of and was connected with one which had assembled there the night before, and with the same object,—it was held that all the proceedings and objects of both gatherings, together with the provocation to the defendant and his acts, constituted together one entire transaction. [See Rector's case, *ante*, p. 795; Meade's case, *ante*, p. 798.]

2. The homicide having resulted directly from said assemblages, and their riotous conduct, it was the right and duty of the prosecution to show the transaction as a whole, its nature and its objects, whether tending to show the guilt or innocence of the defendant. [Maher v. People, 10 Mich., 212; Brown v. People, 17 Mich., 429.]

3. Whether the prosecution failed to do so or not, it was the right of the defendant, either by cross-examination or by his own witnesses, to go fully into all matters thus constituting the *res gestæ*, and to show any act or declaration of any one of either assemblage, in furtherance of the common object, or in reference to it, from its inception to its close—the combination once being shown.

4. A witness for the prosecution, (one of the rioters,) having testified fully in reference to the proceedings of the first night, and that defendant had confessed to having struck deceased on the second night, denied, on cross-examination, that he had stated to different persons soon after, that he was present as a "horner," but was a mere looker-on, and took no part in the matter whatever. The Court refused to permit the defendant to contradict said testimony. *Held*, that said statements related to the *res gestæ*, and their contradiction was competent. [Acc. Goodrich's case, *ante*, p. 532.]

5. There is no positive rule for the definition of justifiable homicide.

It must depend upon the circumstances and surroundings of each case. [Acc. Cotton's case, *ante*, p. 316; Robert Jackson's case, *ante*, pp. 481, 482.]

6. If, from the defendant's knowledge of his mother's peculiar physical condition, he had reason to believe that her life was endangered by the riotous proceedings, and if the rioters were informed of her condition, or if all reasonable or practicable efforts had been made to notify them of the fact, it was sufficient to excuse his conduct toward them to the same extent, as though the danger to her life had resulted from an actual attack upon her person, or as though in the like danger from an attack upon himself; and he was justifiable in using the same means of protection in the one case as in the other. [See authorities cited in note, *ante*, p. 750.]

7. If the noise and tumult of the rioters prevented defendant giving them notice of the danger to his mother, he was excused from doing so.

8. The defendant was justifiable in acting for his defence according to the circumstances as they appeared to him; and if from those circumstances, he believed there was imminent danger of death, or great bodily harm to himself, or any member of his family, and he had tried all reasonable means which would, under the circumstances, naturally occur to a humane man to repel the attack, he might resort to such forcible means, even with a dangerous weapon, as he believed to be necessary for protection; and if such means resulted in the death of any of the supposed assailants, the homicide would be excusable. [Acc. Hurd's case, *post*; Pond's case, *ante*, last case; Carroll's case, *ante*, p. 804; Meade's case, *ante*, p. 798; Sloan's case, *ante*, p. 517, 6th res., and references.]

Error to Oakland Circuit.

The defendant was tried and convicted for the homicide of one Elias Cowles.

Upon the trial, the people offered proof, tending to show that a few days prior to the 17th day of December, 1867, the defendant, John Patten, who was then residing in Highland, in said county, got married to a Miss Sarah Grow; that on the night of the 17th, Luther Mills, George Mills, James Lockwood and others, to the number of from eight to fifteen, got together and went to said respondent's to "horn" him. That they went there in the night time, between nine and ten o'clock; that one of the party had a gun; others, tin horns, cow-bells, etc; that they went in upon the premises of said Patten, who was then living upon a farm with his father and mother; and commenced their "horning" by shooting the guns, blowing the horns, ringing bells and yelling, and soon after defendant came out and ordered them off, and they all ran off. It further appeared, that defendant

heard that the horners proposed to visit his house the next night.

The people further offered proof, tending to show that Elias Cowles, the deceased, on the following day, made preparations to go the next night to "horn" the prisoner; that he met with some fifteen or twenty others, and on the night of the 18th, was elected captain; that they had guns, tin pans, a horse fiddle, and other instruments to make noises with; that they had seven or eight guns, army muskets, so-called, and shot-guns; that one of the party had a shot-gun loaded with powder and shot, which had been loaded a few days before to shoot rabbits with, and that the boy who had this gun, fired it off in the air after they got to Patten's; that they went into the yard of the premises of defendant, and there fired their guns into the air, and blew their horns, rang their bells, and made as much noise as they could upon these instruments; that they passed from the road into the yard through a large gate; that they walked along still without making any noise, until the word was given, and then all the guns were to be fired at once, and then the other noises to commence; that Elias Cowles requested William Lee, one of the party, and a witness, to give the word, as they, the Pattens, would not be so likely to know his voice; that he, William Lee, did give the word, and all the guns were fired; that the said Cowles had a gun; that he (Lee) had a joint of a flute, and blowed on it; that there was considerable yelling; that after the noise had been going on a few minutes, John Patten came to the door, near where they were, but said nothing; he went back into the house, and soon came out and went towards Elias Cowles, who was standing facing him, with the butt of his gun on the ground; that John Patten ran up to him; that said Lee heard a blow; that he looked and saw Elias Cowles down on his hands and knees; that Patten struck a second blow; that he then saw that he had an axe; and this blow struck Cowles on the head and knocked him clear down; that the witness hallooed, "For God's sake, don't let

him kill this man," and stepped towards the prisoner, and he ran back into the house; that Cowles got up, picked up his hat and his gun—some one asked him if he was hurt; he said he guessed not much, but he must go and get a drink of water; that he died next day from wounds received that night.

The prosecution asked Lee, under objection:

"Did you go to Patten's for any other purpose than to 'horn' Patten?"

The Court overruled the objection and admitted the evidence, and defendant excepted.

The counsel for the defendant asked the people's witness, on his cross-examination, if Cowles did not tell him that the boys running away the night before, was a cowardly act, and that night they were going to get a company together, and go there and stand their ground.

The prosecution objected, and the Court sustained the objection.

On the part of the defendant, it appeared that he resided with his father and mother, who were aged and infirm people; that the old lady was quite feeble, and had for many years suffered from palpitation of the heart, and also from spells of dizziness; that any unusual excitement brought on the palpitation of the heart, and any overdoing or prostration was likely to be followed by attacks of dizziness.

That the defendant, on being aroused by the noise out of doors, went down stairs; that his mother was in great terror lest violence should be done.

That she begged him to drive them off; that he then stepped to the door and ordered them off; they paid no attention to it; the noise kept on; he stepped to the door again, and took the axe and stepped out; and several voices cried out, "Shoot him, damn him, shoot him;" that as he stepped out towards them, the crowd sallied on to him, and he was struck with a gun or other weapon; that he struck deceased, and then went into the house, and that several gun wads were fired through the open door.

The counsel for the prisoner submitted several requests in writing, and asked the said Court to charge thereon, among which were the following: *First*—"That private persons may forcibly interfere to suppress a riot or resist rioters; and although a riotous attack be not a felonious one, yet, if the riot be directed against the property or the house of the person who resists it, in making such resistance he has a right to the use of such means as will make the resistance effectual; and if, in making such resistance effectual, one of the rioters be necessarily killed, the killing will be excusable homicide."

The Court refused, but did instruct the jury "that if the rioters were there upon the premises of the prisoner, and did no injury to the property, and did nothing but make their noises, it would be but a mere trespass, and the owner could not eject them or expel them by force, to the extent of taking life, unless to prevent some felony about to be committed or attempted by the rioters, or to save life or limb."

The following requests to charge were all refused and excepted to:

Second—"That persons have a right to the peaceable possession of their premises and property, and if, while in the peaceable possession of such property, a riotous assemblage takes possession of such property in the night-time, and undertakes to maintain such possession by force, the owner may repel such riotous assemblage by force, and if, in making such resistance effectual, one of the rioters be necessarily killed, the killing will be excusable homicide."

Third—"That the law of self-defence is a law of nature. It extends not only to the person himself, but to those who bear the relation to him of parent, wife, and it also extends to his house, called in the law his 'castle,' and a person may make effectual this defence; and if, in making this defence, it becomes necessary to take the life of the aggressor, it will not be felonious, but will be excusable homicide."

Fourth—"That if, from all the evidence and circumstances proved, the jury find that the prisoner had reasonable grounds to believe that there was, before he struck the blow, a design to commit any felony upon his house, or upon any member of his family, and that the deceased was either principal in such design or present as accessory, the killing of the deceased will be excusable homicide, although it afterwards appear that no felony was intended."

The Court refused, except with the following qualification and amendment, to-wit: after the words, "members of his family," insert these words, "and the danger imminent," and at the end of said request, add the words, "provided he first used all other means in his power to prevent the accomplishment of the supposed intended felony."

Fifth—"That the prisoner had a right to judge, and upon the facts and circumstances which surrounded him, as they appeared to him at the time of the homicide; and if, from all the evidence, the jury find, that the homicide was committed in repelling an unlawful and malicious assault upon his dwelling-house, and he used only reasonable and necessary means to prevent it, the act of the killing will be excusable homicide."

The Court refused, except with the following qualification and amendment, to-wit: after the words, "appeared to him at the time of the homicide," insert the following words, "but at his own peril; and it is the province of the jury to determine, from all the facts and circumstances, whether the accused had reasonable cause to apprehend imminent danger to life or limb, or that a felony was about to be committed."

Sixth—"That if the jury shall find that the prisoner was laboring under a reasonable apprehension that his mother was so affected, by the riotous assemblage, that she was likely to die, or to receive grievous bodily harm, and he could not remove the rioters from his premises without force, and by resort to force the deceased was killed, the killing will be excusable homicide, provided

no more force was used than was necessary, under the circumstances, as they appeared to the prisoner at the time, in repelling the riotous assemblage."

After the Judge had concluded his general charge to the jury, he further charged, that a riot was not a felony, but only a misdemeanor.

The defendant was convicted of manslaughter.

M. E. Crofoot, for plaintiff in error; *Dwight May*, Attorney-General, for the people.

CHRISTIANOY, J., delivered the opinion of the Court:

The evidence on the part of the prosecution, as well as that on the defence, shows very clearly that the riotous assembly, which gathered about the house of the defendant, on the night of the homicide, grew out of, and was directly connected with, that which had assembled there the night before, and had the same object in view: that Cowles, the deceased, on the day intervening, went around to several boys and young men, to induce them to go the next (second) night; that he was active in getting up the second riotous assemblage, and was elected their captain. All the proceedings and objects, therefore, of both assemblages, the provocation thereby to the defendant, and his action in opposition to them, constituted together one entire transaction, or the *res gestæ*. And it was also clear that the homicide, whatever the legal character, resulted from these assemblages, and their riotous conduct, and would not otherwise have occurred. It was not only the right, but the duty of prosecution, to show generally the transaction as a whole, its nature and its objects, whether its tendency should be to show the guilt or innocence of the defendant. *Maher v. The People*, 10 Mich., 429; *Brown v. The People*, 17 Mich., 212. This was not only necessary in fairness to the prisoner, but to enable the jury, from a view of the whole, to estimate and apply each particular item of evidence which might be adduced in any stage of the case. But whether the prosecution did this or not, it was the clear right of the defendant, either by cross-examination,

or by witnesses introduced in his defence, to go fully into all matters thus constituting the *res gestæ*. He could not be bound by the showing on the part of the prosecution, but was at liberty to show that the transaction as a whole, or in any of its parts or purposes, was different from that shown by the prosecution. And for this purpose, it was competent for him to show any act or declaration of any individual of either assemblage, in furtherance of the common object, or in reference to it, from the inception to the close of the transaction; their combination or concert having already sufficiently been shown.

The defendant undertook to do this by the cross-examination of the prosecutor's witnesses; and the proposed cross-examination was strictly legitimate, under any rule ever applied to cross-examination, as it related directly to matters called out on the direct examination. The prosecutor's witnesses, some of the rioters themselves, had already given evidence, tending to show, that the only object of the rioters was, to go upon the defendant's premises for the purpose, as they expressed it, of "horning the defendant," who had lately been married, and that they contemplated no violence nor injury to person or property. The defendant offered to show, on cross-examination, that at the time the rioters made the arrangement to assemble the second night on the defendant's premises, their running away the night before was talked of by them, and was called a cowardly act; that they were going to get a company together that (second) night, who were not afraid, and would stand fire, and stay on the premises, and horn the defendant, whether he liked it or not; and that they would not go off the premises or be driven off.

This cross-examination the Court erroneously refused to permit; and the error would not have been less, had the defendant offered to show the same facts by witnesses of his own. The Court equally erred in refusing the defendant the right to show that Cowles, the deceased, had said substantially the same thing to one of the witnesses on the part of the prosecution.

Henry Butler, who was one of the rioters on the first night, (though not upon the second), and who had testified fully on the part of the people, in reference to the proceedings of that night, and had also testified, that defendant had confessed having struck the deceased three times on the last night, was asked on cross-examination, whether he did not, at the house of Mrs. Barret, a few nights after, state to her, that he was not there the first night as one of the company of the horners, but that he happened there as a mere looker-on, and took no part or lot in it whatever; to which he answered in the negative. Similar questions were asked him as to similar statements to other persons—all which he denied. These questions were avowedly asked for the purpose of laying a foundation for impeaching him, by showing that he had made statements out of court in reference to the matter, different from those now made under oath.

The Court, holding that such statements, if made, related to matters wholly collateral, and not to the *res gestæ*, refused to allow the defendant to contradict him, by showing that he had made the statements which he denied having made. This, also, was erroneous. The statements related to the *res gestæ*, and the proposed contradiction, if shown, would have tended seriously to weaken his credibility.

Various questions were raised upon the charge to the jury, and several special requests were made by defendant to charge upon specific points, some of which were refused, or charged in a modified form; and some were based upon hypotheses, not warranted by any evidence in the cause.

We think it better to indicate what should have been the principles of the charge, as a whole, upon the points in dispute, than to consider the detached parts presented by the several requests to charge, which would tend rather to confuse, than elucidate the real questions involved.

No fault seems to have been found with the charge, as it related to the distinction between murder in the

first and second degree, or between murder or manslaughter. The object of all the defendant's special requests was, to obtain from the Court a charge, which should authorize or require the jury, upon certain supposed states of facts, to find the killing excusable homicide.

A correct idea of excusable homicide is not, perhaps, easily expressed by a brief abstract definition, without special reference to the facts of particular cases. We accordingly find the latter more adopted in all the books. It has been thought safer to illustrate by particular instances, than to undertake to define, in advance, all the particular elements or combinations of facts which may render homicide excusable.

Of course, the enumeration of particular cases, does not exclude any others falling within the like principles. But the principles which underlie and result from all the cases in which the homicide has been held excusable in self-defence, or in defence of one's family, or persons standing in particular relation to him, or of his property, are so fully and accurately stated in the opinion of my brother CAMPBELL, in *Pond v. The People*,* 8 Mich., 150, that an attempt to enumerate them here, would be a mere repetition. The principles there laid down, apply equally to the present case, upon certain states of fact, which it was competent for the jury to find from the evidence. That case, however, differed from the present, in certain important particulars. There, an actual attack upon the defendant's dwelling was going on, and the rioters were in the act of demolishing it, and a servant of the defendant, then in the house, was being violently and, to all appearances, dangerously assailed. when the fatal shot was fired.

In the present case, no actual attack had been made upon the defendant's house, nor forcible attempt to enter; and, unless the defendant, when he stepped out of the house with the axe, was, as in his statement he claimed to be, actually struck by some one or more of

* *Ante*, last case.

the rioters, there was no actual attack made on the defendant, or any one of his family. There was, however, evidence tending to show that, when the door was standing open, and the defendant and his father and mother were ordering the rioters off, the wads from some of the guns were fired into the house. The evidence, also, tended to show, that the defendant knew or understood that the general and original object of the rioters in assembling there, was to annoy him and his family by the blowing of horns, ringing of bells, firing of guns loaded only with powder and wads, and by other noises, rather than personal injury to himself or any of his family.

But there was also evidence that, before the defendant stepped out, there were threatening cries among the rioters "to bring him (or fetch him) out," or to "bring or fetch them out," which must have referred to the defendant, and perhaps to his wife, and possibly to his father and mother.

Considering the case first, with reference only to the facts existing prior to the time when the defendant went out with the axe, and without reference to the peculiar effects produced by the conduct of the rioters upon his mother, there was nothing, I think, in the evidence, fairly tending to show a state of facts, which would justify or excuse the defendant in rushing out and attacking any of the rioters with an axe, or other dangerous weapon, for the purpose of compelling them to desist or leave, though he might have been excused for attempting to drive them off by force, and, even by blows, with any instrument not calculated to endanger life or limb. But, though, from the sudden, violent and capricious impulses to which an excited mob is always subject, danger may always naturally be apprehended, especially about a man's dwelling at night, whatever the original object of the assemblage may have been, and no one can estimate the nature or extent of the danger—yet, until some actual violence had been done, or attempted, in this case against either the house, or its inmates, the necessity which alone could excuse taking the life of any of the

assailants, had not yet occurred, and might never occur. And, though the defendant had the right to act under the circumstances as they appeared to him, yet, up to this point, (without reference to the defendant's mother), there was nothing in the circumstances which fairly tended to show that he could have believed the dire necessity to have arisen.

We will next enquire, how far the case may be affected by the peculiar effects produced upon the defendant's mother by the conduct of the rioters.

There was evidence from which the jury might have found that, owing to the feeble health of the mother and her peculiar infirmities, the fear and excitement caused by the conduct and threats of the rioters produced upon her alarming effects, from which the defendant might well have apprehended her speedy death if such conduct were allowed to continue. But to render this available to the defendant as an excuse for the homicide, the jury should also find that the rioters were informed of this condition of the mother, and the effects produced by their conduct; or that every reasonable and practicable effort had been made to notify them of the facts—as such are not the ordinary effects of such causes upon people generally, and, therefore, would not naturally be anticipated by the rioters. But, if they had such notice, or the defendant was prevented from giving it, by the noise and tumult of the rioters; then I can see no sound reason why the danger to the mother from their conduct, should not have excused the conduct of the defendant towards them, to the same extent as if the danger to her life had resulted from an actual attack upon her person, or the like danger to the defendant from an attack upon him. And the defendant would, I think, have the right to resort to the same means of protection in the one case as in the other. What these means are, in what contingency they may be used, and how they are to be judged of by the defendant, will be considered under the next head.

There was evidence—and the statement of the prisoner

made on the trial must for this purpose be treated as such—from which the jury might have found, (as supposed in part of the charge given by the Court below) that the defendant took the axe from the house for the purpose of self-defence, and stepped out of the door, for the purpose of inducing the rioters to leave, or of dispersing them; and that, as he stepped out, the crowd cried out, “kill him, damn him, kill him,” and that rushing towards him, some one or more of them hit him with a gun or club or other weapon. If this hypothesis should be found to be true, instead of the charge given by the Court, the jury should, I think, have been told substantially, that the defendant was excusable for acting according to the surrounding circumstances as they appeared to him: and if, from these circumstances, he believed there was imminent danger of death or great bodily harm to himself or any member of his family, then, if he had already tried every other reasonable means, which would, under the circumstances, naturally occur to an honest and humane man, to ward off the danger or repel the attack, he might resort to such forcible means, even with a dangerous weapon, as he believed to be necessary for protection; and if such means resulted in the death of any of the supposed assailants, the homicide would be excusable.

It is not to be forgotten that the rioters assembled there for an illegal object; for the purpose, by their own confession, of a wanton and unprovoked insult and defiance to the defendant and his family; that the unpleasant, and, as it turned out, the terrible crisis, was forced upon the defendant against his will, by their criminal conduct. And while provocation, as such, cannot render the homicide excusable; yet, in estimating the nature and imminence of the danger, in the choice of means to avoid it, or the amount of force, or kind of weapon to be used in repelling it, the excitement and confusion which would naturally result from the surrounding circumstances, for which the rioters alone were responsible, should not be overlooked. To require of the defendant

while under a high degree of mental excitement, induced by their wrongful and criminal conduct, and without his fault, the same circumspection and cool, deliberate judgment, in estimating the danger or the choice of means for repelling it, as we, who are unaffected by the excitement or the danger, may now exercise in contemplating it, would be to ignore the laws of our being, and to require a degree of perfection to which human nature has not yet attained. Of the weight a jury should give to these considerations, no safer standard can be found than their own individual consciousness, and the consideration of what they, with the honest purpose of avoiding the danger, without unnecessarily taking life, might, under the circumstances in which the defendant was placed, be likely to do.

As no fault was found with the charge, in reference to the distinction between murder in the first and second degree, or between murder and manslaughter, it is unnecessary to consider the phases of the case which might call for a charge upon those questions.

A new trial must be granted.

* * * * *

The other justices concurred.

New trial granted.

NOTE.—See further, as to riotous attacks upon the habitation, *Temple v. The People*, 4 Lansing, 119.

HURD v. THE PEOPLE.

[25 MICH., 405.]

Supreme Court of Michigan, October Term, 1872.

J. P. CHRISTIANCY,	} <i>Judges.</i>
J. V. CAMPBELL,	
T. M. COOLEY,	
B. F. GRAVES,	

DEFENCE IN HABITATION—EXCUSABLE HOMICIDE—MANSLAUGHTER—COOLING TIME—RES GESTÆ — PROSECUTION TO PRODUCE ALL ATTAINABLE EVIDENCE—CHARACTER OF DECEASED FOR VIOLENCE—DYING DECLARATIONS—DECLARATIONS OF DECEASED AFTER BEING SHOT—ACTING UPON APPEARANCES OF DANGER.

1. In this case the prisoner and the deceased had an altercation about the alleged ill-treatment by the prisoner, of a boy at the supper table of the prisoner, and the deceased, who was much the larger and apparently the stronger man, seized the prisoner by the lapels of the coat and shook him several times, and threw him on the ground; and the prisoner thereupon went into his house and loaded his pistol, and a few minutes afterwards, came out to where the deceased was at work and requested him to come into the house and ask the women folks whether he had abused the boy; and the deceased threw down his work and ran after the prisoner in a threatening manner, but without any weapon in his hands, and pursued the prisoner into his house, although the prisoner at the threshold commanded him not to enter; and continued the pursuit, until the prisoner had run into a room from which there was no egress, whereupon he turned and shot the deceased, then but four or five feet from him; and, the deceased still advancing, he shot him a second time; of which wounds the deceased died. *Held*, that this was not murder in either degree, but was a case of excusable homicide or manslaughter;—*excusable homicide*, if the jury were satisfied, that the defendant being in his own house, had reason to believe, and did believe, from Hubbard's actions and manner, and what had already taken place, that it was necessary to shoot the assailant to save his own life, or to protect himself from danger of great bodily harm; *manslaughter*, if he did not so believe, but committed the act under a less degree of fear, and the excitement and confusion caused by the first assault, coupled with the then threatened repetition of the attack, and that but for these, he would not have fired the fatal shot.

2. Not more than half an hour, and probably not more than fifteen minutes, having elapsed between the first and second parts of the transaction, as above stated, it is held, that the whole is to be taken together as one transaction, and as constituting the *res gestæ*. It is not proper to treat them as two distinct transactions, with an interval, for the purpose of raising the question of cooling time.

3. The duty of the prosecution in criminal cases to present all the attainable evidence of the transaction stated and discussed. [See Barfield's case, *ante*, p. 624, and note e.]

4. Where a person is assailed and kills his assailant, it is competent for him to prove on trial for the homicide, that the deceased was a man of high temper and quarrelsome disposition, and known by him to be such at the time of the killing; for such knowledge on the part of the assailed is a most important circumstance, from which he is to estimate the probability and the character of the attack, and what course of conduct he is to expect of the assailant, as well as the means which, at the moment, are necessary to save himself from immediate danger; and the exclusion of such evidence in such cases is a serious error. [Acc. Copeland's case, *ante*, p. 41; Robertson's case, *ante*, p. 151; Cotton's case, *ante*, p. 310; Rippy's case, *ante*, p. 345; Monroe's case, *ante*, p. 467; Garbutt's case, 17 Mich., 16; Robert Jackson's case, *ante*, p. 486; Little's case, *ante*, p. 487; Keener's case, *ante*, p. 546; Quesenberry's case, *ante*, p. 549, note; Tackett's case, *ante*, p. 615; BATTLE, J., in Barfield's case, *ante*, p. 625; Pritchett's case, *ante*, p. 635; Franklin's case, *ante*, p. 641; Lamb's case, *ante*, p. 646; Collins' case, *ante*, p. 595, note; State v. Hicks, *ante*, p. 680, note; State v. Keene, *ante*, p. 681, note; Payne v. Commonwealth, *ante*, p. 683, note; Commonwealth v. Seibert, *ante*, p. 686, note; State v. Smith, *ante*, p. 688, note; Fields v. State, (Ala.), *ante*, p. 691, note. Contra, Wesley's case, *ante*, p. 319; Wright v. State, *ante*, p. 484, note; Field's case, (Maine), *ante*, p. 629; State v. Tilly, *ante*, p. 665, note; Bottoms v. Kent, *ante*, p. 666, note; State v. Hogue, *ante*, p. 673, note; State v. Thawley, *ante*, p. 675, note; State v. Chandler, *ante*, p. 676, note; Commonwealth v. York, *ante*, p. 676, note; Commonwealth v. Hilliard, *ante*, p. 678, note; Commonwealth v. Mead, *ante*, p. 679, note; State v. Jackson, *ante*, p. 679, note; People v. Murray, *ante*, p. 681, note; People v. Lombard, *ante*, p. 681, note; People v. Edwards, *ante*, p. 682, note; Wise v. State, *ante*, p. 683, note; State v. Dumphey, *ante*, p. 684, note; Reynolds v. People, *ante*, p. 685, note; Commonwealth v. Ferrigan, *ante*, p. 688, note.]

5. Dying declarations.

6. It is competent to show that the deceased, after the shooting, and while he believed he was going to die, had an interview with the defendant, at which the shooting was talked over, and then and there acknowledged that he was to blame, and asked defendant to forgive him. [Contra. Adams' case, *ante*, p. 211.]

7. One who is threatened with an immediate attack by an assailant, is authorized to act, and his actions are to be judged, in the light of the circumstances as they appeared to him at the time; and if the assailant follows him up in a threatening manner, in order to frighten him, and so as to make him believe that a violent attack is imminent, it is immaterial whether a forcible attack was actually intended or not. [Acc. Patten's case, *ante*, last case; Pond's case, *ante*, p. 814; Carroll's case, *ante*, p. 804; Sloan's case, *ante*, p. 517, 6th res., and references.]

Error to Ionia Circuit Court:

Wells & Morse, and *John C. Blanchard*, for the plain-

tiff in error; *Dwight May*, Attorney-General, for the people.

The plaintiff in error (defendant below,) was tried in the Ionia Circuit Court, upon an information charging him with having murdered Chauncy M. Hubbard. The jury, by their verdict, found him guilty of murder in the second degree; upon which, judgment was rendered against him, and he now brings the case to this Court, upon writ of error and bill of exceptions.

For a full understanding of the questions raised by the exceptions, it is proper to state the nature of the whole transaction, including the material circumstances which led to, accompanied and followed the homicide.

It was admitted, and not disputed on the trial, that Hubbard was shot by the prisoner, and that he died from the effects of the wounds caused thereby. The only questions, therefore, which could arise, were, whether the circumstances, under which the shooting took place, were such as to render the shooting justifiable or excusable, and, if not, then, whether they were such as would negative malice aforethought, and reduce the offence to manslaughter.

Hubbard was much the larger, and, apparently, the stronger man of the two. Hurd had been seriously injured some five or six years before, by a log rolling over him, and seems not to have fully recovered, but was, in consequence, easily excited, his nervous system somewhat shattered and unstrung, and not fully under his control. They had always been on good terms with each other, with no evidence of ill-feeling from Hurd, though there was some slight evidence of previous ill-feeling on the part of Hubbard.

The transaction occurred on the evening of the 8th of August, 1871, in and near the house of Hurd. Hubbard had, for some time, been at work building a barn for Hurd, and, having been absent that day, returned about supper-time, while Hurd and his family and some workmen were at supper, and, without coming to supper, went to work at the barn, a few rods from the house.

At the supper-table there were present, besides Hurd, himself, several hired men, some working for him, and some upon the barn for Hubbard, and several women and a child. A slight difficulty occurred at the supper table, and some words passed between Hurd and a young man or boy, by the name of Mapes, who was at work for him, in reference to helping the boy to a piece of pie, the boy, or some other person, as it would seem, seeking to help himself, and not succeeding very well. Hurd proceeded to take the pie and help him, at which some remark was made by Mapes, to the effect, that "perhaps he (or the other person helped, for it is not certain,) would prefer to help himself;" at which, Hurd replied, in substance, "You are in my house and at my table, and if you live to be older, you will know more than you do now." At this, the boy Mapes took offence, left the table and went out to the barn, (a few rods off,) and reported to Hubbard what had taken place; Hurd, and the other workmen, almost at the same time, being through supper, going out also. Immediately after this, Hurd and Hubbard are seen coming from the road toward the house, apparently in earnest conversation, the first words heard being from Hubbard, saying, "the boy has no friends here to take care of him," (or, to take up for him.) Jerome Evans is present, (who was at the supper-table and saw what occurred there,) and Hurd turns to him and says, "Jerome, did I abuse the boy?" He repeats the question, but Evans makes no answer. Hubbard then steps up to Hurd, as it would seem, in an excited manner, and Hurd says, "do you think I am afraid of you, Mr. Hubbard?" to which, one witness, (Dow) says Hubbard replied, saying, "I do not want you to be afraid of me," and the other, Evans, (for these having been the only two who saw the transaction at this stage,) says, Hubbard then, with his fists doubled, (though Dow does not mention the fists,) got him by the lapels of the coat and shook him six or seven times, (as he himself afterwards admits to several witnesses,) severely; jerking or throwing him down. Evans then steps up and says,

'Don't; I wouldn't have any fight here, Mr. Hubbard, Oh! don't; I wouldn't.' To this, Hubbard, acting, as Evans says, as if he was endeavoring to pick up a stick or a stone, (though Dow does not notice this,) rises up and comes towards Evans, saying, "Get right away, Jack, or I'll go through you like a yoke of oxen." Evans steps back a few paces; Hubbard comes towards him. While this is going on, Hurd starts hurriedly for the house. Hubbard follows him up in an angry manner, and says to Hurd, as the latter is entering the house, "Come back, Hurd;" to which Hurd replies, "No, you don't get me out there to shake me again;" and, going into his house, locks the doors. He asks his wife where his pistol is, and goes in search of it, and not at once finding it, he takes his Spencer rifle in his hand. Dow comes to the door to come in; Hurd, supposing it to be Hubbard, refuses to let him in, but being told it is Dow, lets him in and locks the door again. Dow goes to his supper, and Hurd, presently finding his pistol, loads it; he then goes out, having his pistol in his hand, leaving in the house his wife, two young ladies (his step-daughters), Mrs. Frear and her child, and Dow, who was eating his supper. Hurd goes out towards the barn, and calls to Hubbard, saying, in substance, "Mr. Hubbard, if you are not satisfied, or if you think I abused the boy, come in and ask the women folks; come and ask Mrs. Hurd." Hubbard, who is engaged in ripping a board with his saw, drops the saw and starts rapidly towards Hurd, (some saying that he ran, others, that he walked very fast); using his own language, as given by himself afterwards, he "went for him," "meaning," as he several times reiterated after he was shot and expected to die, "to frighten him, or to scare him." Hurd retreats rapidly to the house, saying to him, "come and ask Mrs. Hurd, ask Mrs. Hurd." Hubbard is close upon him as Hurd enters the house, and coming on, in a threatening manner, directly towards him; as Hubbard gets near, Hurd, looking back, tells him to stop, but he still advances, Hurd still telling him to stop; hurries through a part of the

room where the family are (and where Dow was at his supper), into the door of the bedroom opening from this room, the door of which had no fastening, and, turning around, with one hand on the door, fires his pistol at Hubbard, then from three to six feet from him, and still advancing upon him; this shot wounds him in the breast, and penetrates his lungs, but he does not stop; Hurd retreats a little, and Hubbard advances and reaches for the pistol, but receives a second shot in the bowels; he then puts his hand to his breast, saying, "you have hurt me, Charlie;" and turns to go out the front door, but this being locked, he goes out at the back door at which he had followed Hurd in; goes out into the road, and up towards a neighbor's, Mr. Wheeler's; but, before getting there, is compelled to stop and lie down. As soon as Hubbard leaves, Hurd comes out and sends at once for the doctor, saying he had shot Hubbard; he exhibits the greatest distress and sorrow, weeping and shedding tears; goes to Mr. Alderman, tells him what has happened, giving him his pistol.

He hurries to where Hubbard was lying, wants to take him back to his own house and take care of him, but Wheeler's being nearer, or Hubbard preferring to go there, Hurd goes there, gets a settee and assists in taking him there; while there, with the physicians and neighbors around him, and under the belief that he will not recover, he at several times states the main facts of the occurrence, fully admitting in all his statements, the assault he made upon Hurd, and the cause of it, as above stated, and fully admitting in all these statements, that at the time he followed Hurd into the house, he went fast, or in other words, that "he went for him," and in a threatening manner, with the intention of frightening or scaring him, but to some of the witnesses, as they testify, he said he did not know whether Hurd told him to stop or not; to others, as they testify, admitting that Hurd did order him to stop, and that, after the first shot, he was still "going for him" to get the pistol from him.

The next day, (the 9th,) when Hurd came in, he called

him, and said to him: "Charlie, we have always been friends?" Hurd said "Yes," and they asked each other to forgive. Hubbard died on the 10th.

I have said that Hurd, when Hubbard was following him up into the house, ordered him to stop, when at, or near the threshold, and after he got in; I have stated this because the testimony is so absolutely overwhelming to this point, that if this distinct question had been left to the jury, and found in the negative, it would have been the proper if not imperative duty of the Court, promptly to have set aside the verdict: the people having called but two witnesses to what took place in the house. Dow, who was the nephew of Hubbard, and who saw the assault made by Hubbard out doors as well as in the house, and swears positively to Hurd telling Hubbard to stop, and Mrs. Frear, who only saw what took place in the house, and who did not, or says she did not, hear this, though she admits that from the way Hubbard came in, she was frightened, expected a fight, that her child was frightened, and that she was much engaged in taking care of it, and trying to get out, while all the other women in the house, (three of them,) as well as Dow, swear positively that Hurd did repeatedly tell Hubbard to stop and come no further, but that he kept on and was shot, as already stated. That she did not hear it under such circumstances, can hardly be said to contradict at all, the evidence of the others who did, or to be any evidence that Hubbard was not ordered to stop; but however this may be, there was no controversy upon the facts, admitted and repeatedly declared by Hubbard himself after the shooting, and when he had given up all hopes of living, that he did follow Hurd up into the house in a threatening manner intending to scare or frighten him: in other words, to make him believe that he did intend again to attack him, and *that in his own house, in the presence of his family*. And Hurd had a right to act upon that belief, or upon circumstances as they appeared to him—though Hubbard might not have intended actually to make the attack; and if Hubbard

had been armed with a deadly weapon, this would have tended very clearly and strongly to show a case of excusable homicide; but, as he was not armed with a dangerous weapon, the main question upon the evidence would seem to be, between excusable homicide and manslaughter; *excusable* homicide, if the jury were satisfied that Hurd being in his own house, had reason to believe, and did believe, from Hubbard's actions and manner, and what had already taken place, that it was necessary to shoot the assailant to save his own life, or to protect himself from danger of great bodily harm; *manslaughter*, if he did not so believe, but committed the act under a less degree of fear, and the excitement and confusion caused by the first assault, coupled with the then threatened repetition of the attack; and that but for these, he would not have fired the fatal shot. What provocation and what degree of excitement or confusion of mind will reduce a homicide to manslaughter, as well as the nature of the circumstances which will render it excusable, have been fully explained in *Maher v. The People*, 10 Mich., 212; *Pond v. The People*,^a 8 Mich., 150, and *Patten v. The People*,^b 18 Mich., 314, (clearly recognized in the charge in this case), that we do not deem it essential to go fully into these questions here.

I have detailed the whole transaction or *res gestæ*; and it must be considered a single transaction, at least from the first assault or attack upon Hurd out doors, to the final shooting of Hubbard. The witnesses differ as to the length of time intervening, some stating it to be not more than three minutes; others, not more than twenty or thirty; the weight of the testimony would make it less than fifteen minutes. It was entirely idle for the prosecution to attempt to divide this into two separate transactions: 1st. The assault upon Hurd out doors—a transaction which was, as they claimed, complete and ended when Hurd retreated into the house; and, 2d. An entirely new and separate transaction occurring in the house at the time of the shooting, and thus to raise

^a*Ante*, p. 814. ^b*Ante*, last case.

the question of cooling time. The transaction was manifestly one and entire, all its parts inseparably connected; and when Hubbard followed Hurd up into the house, threatening another attack, Hurd was authorized to, and manifestly must have construed his actions and intentions then with reference to, and in connection with, what had previously taken place out of doors.

Now, it is quite manifest, and no one, in the face of the facts stated, would have the assurance to deny it, that if Hubbard had not made the first assault upon Hurd out doors, and then followed him up with the apparent intention of attacking him again, the shooting would not have occurred. These acts, in fact, constituted the provocation, without which, the act would not have been committed. The provocation may not have been sufficient, it is true, to excuse the act, or entirely take away its criminality; that depends upon the question, whether, as already stated, the acts of Hubbard and the circumstances as they appeared to Hurd, under the excitement, haste and confusion of the moment, rendered it necessary, in his opinion, for the protection of his life, or to avoid grievous or dangerous bodily harm. The fact that he armed himself before going out the second time, when taken in connection with what preceded and what followed, cannot be considered as tending to show malice, however strong may be its tendency to establish a case of manslaughter. His conduct showed that he was anxious to have the matter of the difficulty with the boy, which had so excited Hubbard, fully explained to him; and, for that purpose, wished him to enquire of the women. His arming himself before he went to invite him to come and hear the explanation, would seem to have been only to protect himself against the rashness which he had reason to apprehend from Hubbard; and, upon the evidence, there is no room for doubt, that had Hubbard come in quietly and listened to the explanation, the difficulty would have been amicably settled. All the evidence tends to show that, but for the foolish and reckless bravado of Hubbard, in following up in a threat-

ening manner, so as to make him apprehend an instant attack, Hurd would never have fired. But there being no evidence of previous malice, and the contrary being shown, there was clearly no evidence in the case tending to show murder, either in the first or second degree; unless it be the evidence of Mrs. Frear alone, and not even her's, unless the whole transaction was such only as appeared by her testimony, to the exclusion of all the other evidence in the case. But, aside from the improbability of such a conclusion, the prosecution were not at liberty to put the case to the jury upon any such hypothesis; for, *confessedly, the whole transaction did embrace much more than that shown by her testimony.* She only saw what occurred in the house; she knew nothing of what had taken place out doors, and, therefore, contradicted nothing stated by other witnesses, as having occurred there. The prosecution had already, by Dow, their own witness, on his direct examination, proved the assault made by Hubbard upon Hurd out of doors, and by him and Mrs. Frear, the occasion of it. They proved, also, that Hubbard followed him up in a hurried and threatening manner, when he went into the house a second time, and by Hubbard's own admissions, that this was done to scare or frighten him; and these facts were uncontradicted and admitted. But Mrs. Frear spoke only of what occurred in the house, which, therefore, was *confessedly* but a *portion* of the transaction. Had what she testified to, constituted the whole transaction, her evidence would have had some tendency to prove the transaction to be murder, as she says she heard Mr. Hurd tell him to come in and ask Mrs. Hurd, and did not hear him tell him to stop and come no further; still, even she admits, that from the way he came in, she was frightened and tried to get out doors with her child; tending to show, at least, that Hurd had some cause of alarm, and reason for acting hastily and without due consideration.

But the prosecution can never, in a criminal case, properly claim a conviction upon evidence, which expressly

or by implication shows but a part of the *res gesta*, or whole transaction, if it appear that the evidence of the rest of the transaction is attainable. This would be to deprive the defendant of the benefit of the presumption of innocence, and to throw upon him the burden of proving his innocence. It is the *res gesta*, or whole transaction, the burden of proving which rests upon the prosecution (so far, at least, as the evidence is attainable.) It is that which constitutes the prosecutor's case, and as to which the defendant has the right of cross-examination: it is that which the jury are entitled to have before them, and, "until this is shown, it is difficult to see how any legitimate inference of guilt, or the degree of the offence, can be drawn." The prosecution, in a criminal case, is not at liberty, like a plaintiff in a civil case, to select out a part of an entire transaction which makes against the defendant, and then to put the defendant to the proof of the other part; so long as it appears at all probable, from the evidence, that there may be any other part of the transaction undisclosed, especially if it appears to the Court that the evidence of the other portion is attainable. The only legitimate object of the prosecution, "is to show the whole transaction as it was, whether its tendency be to establish guilt or innocence." The prosecuting officer represents the public interest, which can never be promoted by the conviction of the innocent—his object, like that of the Court, should be simply, justice; and he has no right to sacrifice this to any pride of professional success; and, however strong may be his belief of the prisoner's guilt, he must remember that, though unfair means may happen to result in doing justice to the prisoner in the particular case, yet that justice so attained is unjust and dangerous to the whole community; and, according to the well-established rules of the English courts, all the witnesses present at the transaction should be called by the prosecution before the prisoner is put to his defence, if such witnesses be present or clearly attainable. See *Maher v. The People*, 10 Mich., 225, 226. The English rule goes

so far, as to require the prosecutor to produce all present at the transaction, though they may be the near relatives of the prisoner. See Chapman's case, 8 C. & P., 559; Orchard's case, *Ib.* (note), Roscoe's Cr. Ev., 164. Doubtless, where the number present has been very great, the production of a part of them might be dispensed with, after so many had been sworn as to lead to the inference, that the rest would be merely commutative, and there is no ground to suspect an intent to conceal a part of the transaction. Whether the rule should be enforced in all cases, where those not called are near relatives of the prisoner, or some other special cause for not calling exists, we need not determine; but, certainly, if the facts stated by those who are called, show *prima facie*, or even probable reason for believing, that there are other parts of the transaction to which they have not testified, and which are likely to be known by other witnesses present at the transaction; then, such other witnesses should be called by the prosecution, if attainable, however nearly related to the prisoner.

But, (though no objection seems to have been made on the trial) we allude to this subject for the purpose of calling attention to the evident disregard on the trial of this case, of the rule laid down by this Court in *People v. Maher* above cited. According to the rule there laid down, and from which we see no reason to depart, the prosecution should have been put to call Jerome Evans, at least, who was present at the first assault, and took part in stopping the fray; as shown by the witness, Dow, on the part of the prosecution. In the very nature of the case, he was the people's witness, and should have been called by them, he being, as is evident, attainable, and subsequently sworn for defendant, and it appeared from his testimony that he heard the conversation leading to the first assault, at an earlier stage than Dow, and no relationship to, or complicity with the defendant being shown or pretended.

We now proceed to the special exceptions. It is assigned as error that the Court allowed Abraham Alder-

man on the part of the people, to testify what the deceased said to him after the shooting, as to the manner in which the defendant called the deceased into the house, as evidence had already been given, tending to show that the deceased at the time of making the statement, was under the apprehension and belief of speedy death, and the statement related to an important part of the transaction. Connected with the shooting, we see no force in the objection.

It is also alleged as error, that the Court declined to allow the counsel for defendant to examine Doctor Joslin, to show that after the shooting, while the deceased believed that he was going to die, the defendant and the deceased were present together, and talked the matter of the shooting over, and that the deceased then and there acknowledged that he was to blame, and asked defendant to forgive him. But this error (for it would otherwise have been an error), was cured by the witness himself stating what was actually said on the occasion alluded to, viz: that when Hurd came to the house where Hubbard lay, Hubbard called Hurd, and said, "Charlie, we have always been friends?" Hurd said "Yes," and they asked one another to forgive. "I don't know," said the witness, "as he said anything in particular about who was to blame." The defendant, therefore, could not have been prejudiced by the refusal to admit the proposed evidence when offered.

But it is further alleged as error, that the Court refused to allow the defendant, to show by the witness, Jerome Evans, that the deceased was a man of high temper, and quarrelsome disposition, and known by the defendant to be so at the time of the shooting. This, we are satisfied, was a serious error, directly affecting the question of the defendant's guilt, and if the defendant when threatened with immediate attack by an assailant, is authorized to act, and his actions are to be judged from the circumstances as they appeared to him at the time, as held by this Court in *Pond v. The People*,^c 8 Mich., 150, as ad-

^c *Ante*, p. 814.

mitted by the Court in his charge, (a principle of natural justice—which must never be overlooked in such cases), then it necessarily follows that the evidence offered was admissible, since the knowledge or belief of the prisoner that the person threatening him with an immediate personal attack, is a man of high temper and quarrelsome disposition, is a most important circumstance, from which he is to estimate the probability and the character of the attack, and what course of conduct he has reason to expect from the assailant, as well as the means which, at the moment, he may deem necessary to guard himself from the threatened danger. This must, in the nature of the case, be so with any man placed in the situation the defendant occupied at the moment of the shooting.

And after what has already been said, it is hardly necessary to remark, that it is quite immaterial in this case, whether Hubbard actually intended to make a forcible attack upon Hurd or not, at the time he was shot; since from Hubbard's own repeated statements after being shot, he was following Hurd up in such a manner as to frighten him, which he could not expect to do, without making Hurd believe from his actions that a violent attack was imminent.

The judgment must be reversed and a new trial awarded.

Judgment reversed

GRESCHLA v. THE PEOPLE.

[53 ILL., 295.]

*Supreme Court of Illinois, January Term, 1870.*SIDNEY BREESE, *Chief Justice.*CHARLES B. LAWRENCE, } *Justices.*
PINKNEY H. WALKER, }

COMBAT IN HABITATION—LAWFUL DEGREE OF FORCE IN EXPELLING ASSAILANT.

1. Upon the trial of a party on the charge of murder, it appeared that the deceased went to the room of the prisoner for a lawful purpose, and while there demeaned himself properly, though some altercation occurred between them, and hard words were exchanged. The deceased, however, left the room and proceeded down a stairway, remarking as he went, to the prisoner, "Go with all the money you have got; hasn't your wife to beg every day?" To which the prisoner replied, "You go, you rascal, go." At this, the deceased turned to go up the stairs again in an angry mood, when the prisoner said, "Come back, I will fix you." As the deceased advanced to the door of the prisoner's room, unarmed, in the act of entering, it being open, the prisoner seized a rolling pin, and wielding it with both hands, struck deceased three or four blows, fracturing his skull so severely that he died therefrom the following day. *Held*, that the homicide was entirely inexcusable, and that the punishment assessed, to-wit, one year in the penitentiary, was much lighter than the jury would have been warranted in inflicting.

2. It was not erroneous in such case for the Court to instruct the jury, that, in considering whether the killing was in defence of habitation, they should consider the attending circumstances, the conduct of the parties at the time and immediately preceding the killing, and the means and force used, as bearing upon that question.

3. And the jury might properly further consider, in determining whether the killing was in self-defence, whether the force used in repelling the deceased, in its amount and character, was not such as a reasonable mind would regard as unreasonable, under the circumstances.

4. If the use of a deadly weapon was not necessary, or apparently necessary, in order to prevent the deceased entering the room of the prisoner, and committing, or offering to commit, an assault upon him, and he could reasonably and safely have avoided using the weapon, it was his duty to have done so, even though the deceased was returning to the prisoner's room with a quarrelsome intent. [Acc. Carroll's case, *ante*, p. 804; Pond's case, *ante*, p. 814.]

Writ of error to the Superior Court of Chicago.

Indictment against Carl Gresur, *alias* Carlo Greschia, for the murder of Stephania Langarmarsen. The circumstances attending the homicide are stated in the opinion of the Court.

On behalf of the prosecution, the Court instructed the jury among other things, as follows:

4. "The Court further instructs the jury, in the words of the statute, that if a person kill another in self-defence, it must appear that the danger was so urgent and pressing, that in order to save his own life, or to prevent his receiving great bodily harm, the killing of the other was absolutely necessary.

"A bare fear of any of these offences, to prevent which the homicide is alleged to have been committed, shall not be sufficient to justify the killing. It must appear that the circumstances were sufficient to excite the fears of a reasonable person, and that the party killing really acted under the influence of those fears, and not in a spirit of revenge.

5. "The Court instructs the jury, that if they believe from the evidence beyond a reasonable doubt, that the deceased, Langarmarsen, and the defendant, Greschia, had a quarrel, with words, in or near the defendant's room, and on the stairs leading to said room; and that the deceased, after going a part way down stairs, turned about and went up the stairs, as if going to said room to meet said defendant, with the purpose further to continue said quarrel, and that the deceased had no weapon or dangerous instrument; and that when the deceased got nearly to the door of said room, or to it, the defendant wilfully, intentionally and feloniously, struck the deceased several violent and severe blows on the head with the club mentioned by the witnesses, and shown in evidence; and that such club was a dangerous and deadly weapon, when it was not necessary or apparently necessary, in

order to prevent the deceased from entering said room and committing or offering to commit, an assault upon said defendant, and when the defendant could have reasonably and safely avoided using such club, in the manner aforesaid, then the jury should find the defendant guilty of manslaughter, if they believe from the evidence, that deceased died from the effects of such blows."

The following instructions were given for the defendant, that portion in brackets being modifications of the instructions asked:

1. "If the jury believe from the evidence, that the defendant inflicted the fatal blow upon the deceased in self-defence, while the deceased was manifestly intending and endeavoring, in a violent manner, to enter the habitation of the defendant, for the purpose of assaulting or offering personal violence to the defendant, being therein, then the killing was justifiable, and the jury ought to acquit the defendant. [But the jury, in considering whether the killing was justifiable, on the ground that the killing was in self-defence, while the deceased was endeavoring, in a violent manner, to enter the prisoner's habitation, should consider the circumstances attending the killing, and the conduct of the parties at the time, and immediately previous thereto, and the means used, and the degree of force used by the prisoner in making what is claimed to be this self-defence, as bearing upon the question, whether the blows given were actually given in self-defence, or whether they were given in carrying out an unlawful purpose. If the force used was unreasonable in amount and character, and such as a reasonable mind would have so considered under the circumstances, it is proper for the jury to consider that fact, in determining whether the killing was done in self-defence.]

2. "If the jury believe from the evidence, that just prior to his death, the deceased attempted, in a violent manner, to enter the dwelling of the defendant, for the pur-

pose of assaulting or offering personal violence to the defendant, being in said dwelling, or any other person dwelling or being therein, and that the defendant in [reasonably] resisting such attempt of the deceased, unintentionally and without malice killed the deceased, then the killing was justifiable or excusable, and the jury ought to acquit the defendant. [The jury, in considering whether the killing was in defence of habitation, should consider the circumstances attending the killing, and the conduct of the parties at the time, and immediately previous thereto, and the means and force used, as bearing upon the question of whether the killing was in defence of habitation.]”

Verdict, guilty of manslaughter, and punishment fixed at confinement in the penitentiary for one year, and judgment accordingly. The defendant thereupon sued out this writ of error.

Miller, Van Arman and Lewis, for the plaintiff in error; *Charles H. Reed*, State's Attorney, for the people.

BRESE, Ch. J., delivered the opinion of the Court:

The plaintiff in error was indicted in the Superior Court of the city of Chicago, for murder, and a verdict rendered of manslaughter, and sentencing him to confinement in the penitentiary for one year, on which the Court entered judgment.

The points made here by the plaintiff in error, question the correctness of this finding, and also the ruling of the Court upon the instructions.

As to the finding, we have examined with care, all the evidence in the record, and are constrained to say, it is of such a character, as to have justified the jury in imposing a sentence upon the prisoner, much more severe than they did impose, for we are unable to see a single mitigating circumstance in favor of the prisoner in the whole case.

The deceased was at the prisoner's room for a lawful purpose. He had been an inmate of his family, a

boarder in it, keeping his clothes there. His business or inclination induced him to leave Chicago for Rock Island, and while there, he wrote to one of the witnesses to get his clothes from the prisoner's room, and send them to him by express. This was not done, and after an absence of some weeks, deceased returned to Chicago, and went to the prisoner's room for his clothes, where some altercation occurred between them, and hard words exchanged. The deceased got his clothes, and was proceeding down stairs with them under his arm, when the deceased said to the prisoner, "Go with all the money you have got; hasn't your wife to beg every day?" To which the prisoner replied, "You go, you rascal, go." At this, the deceased turned to go up the stairs again, when the prisoner said, "Come back, I will fix you." As the deceased advanced to the door of the prisoner's room, and was in the act of entering it, it being open, the prisoner seized a rolling-pin, and wielding it with both hands, struck deceased three or four blows with it, on his head, fracturing the skull, the fracture extending clear through from the orbital process to the occipital bone, inflicting a wound "past all surgery," and of which the man died on the following day. The deceased did not, as insisted by the prisoner's counsel, seek to enter the prisoner's room forcibly. He was there in the first place rightfully, to get his property which he had left there. The prisoner made no objection to his going there for that or any other lawful purpose, and while in the room he demeaned himself properly. He had no weapon, nor did he give any indications of a quarrelsome intent. When he was leaving peaceably with his clothes, irritated by a remark the prisoner had made while deceased was descending the stairs, he suddenly turned, and in angry mood went towards the prisoner, the prisoner having told him to "come on."

The case has but few points of resemblance to the case of *Reins v. The People*,* 30 Ill., 256, on which the

* *Reins v. People*, 30 Ill., 256. The facts of this case are set out at length in the reporter's statement. The following portions of the charge

prisoner's counsel seem to rely. In that case, the pris-

to the jury, and the comments of the Supreme Court thereon, are all that is deemed material to insert here. The Court charged, among other things, for The People, as follows: "4. If the jury believe from the evidence, that the deceased, John Kaine, and the defendant, Michael Reins, had words and blows with and against each other shortly before the alleged killing, and that after having such words and blows, they were separated, and that Kaine thereupon left the shanty of Foley; and if the jury further believe from the evidence, that the defendant, after Kaine went out, followed him to the door with a view to renew the fight, and that Kaine thereupon turned back to attack and beat the defendant, and that the defendant, while Kaine was entering the door, stabbed and killed him, then the defendant is guilty of manslaughter, and the jury should so find, unless the jury further believe from the evidence, that said stab was given by the defendant, while actually fearing loss of life or great bodily harm to himself from the assault of Kaine, and not in a spirit of revenge. The bare fear of injury to the body is not a sufficient justification in any case, for killing. The threatened danger must be so great as to create a reasonable belief, in the mind of the person assaulted, of imminent peril to life or the most serious bodily harm."

The defendant then asked the following instruction, among others, which was refused: "1. If the jury believe from the evidence, that the defendant Reins, in defence of himself, inflicted upon the deceased the wounds and stabs which caused his death, while the deceased was manifestly intending and endeavoring in a violent manner, to enter the habitation of the witness, Mrs. Foley, for the purpose of assaulting or offering personal violence to the defendant Reins, being therein, the killing was justifiable, and the jury must acquit the defendant."

BRESE, J., delivering the opinion of the Supreme Court, to which the cause had been removed by writ of error, commented upon the above instructions as follows: "A portion of the fourth instruction given for The People is also objectionable. The charge was manslaughter, and the defence was justification. The words of the statute are in substance, that a person indicted for this offence, may prove that in order to save his own life, or to prevent his receiving "great bodily harm," he may kill his antagonist. "Great bodily harm" falls far short of "the most serious bodily harm." The one may endanger life; the other not. The first instruction asked by the defendant should have been given. Section thirty-two of our criminal code, defines justifiable homicide to be 'the killing of a human being in necessary self-defence, or in the defence of the habitation, property or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a known felony, such as murder, rape, robbery, burglary, and the like, either upon person or property, or against any person or persons who manifestly intend and endeavor, in a violent, riotous or tumultuous manner, to enter the habitation of another, for the purpose of assaulting or offering personal violence to any person dwelling or being therein.'

* * * * *
"For the reasons given, the judgment of the Court below is reversed, and the cause remanded."

prisoner had retreated to Mrs. Foley's house, and seeing the deceased, with whom he had been fighting, coming to the house, the door was closed, and in the forcible attempt of deceased to open the door, the fatal blow was inflicted. To make this case like Reins' case, the prisoner, instead of using this murderous weapon against an unarmed man, crushing his skull with it, even at the very threshold of his open door, had, on seeing the approach of the deceased, quietly shut and bolted the door, and the deceased had then attempted to force an entrance, it might be, the prisoner would have been justified in using the weapon he did, if there were real grounds for apprehending violence from the deceased, should he succeed in forcing the door, and if no other ready means of self-preservation were at hand. But the prisoner invited the deceased to "come on." Reins did not, but sought to keep the aggressor beyond his reach, by fleeing to a house and closing the door. To say that a man having ready means at hand to protect himself from an assault, if one was threatened, which there was not in this case, and this, too, without running away or leaving his tracks, shall neglect such means, and, on the instant before an assault is made, or any force or violence used, or even threatened, shall seize a deadly weapon, and with it inflict deadly blows upon an unresisting victim, is justifiable, would be placing human life in a most precarious condition indeed. It would be making human blood very cheap.

The facts in this case show malice on the part of the prisoner, and he may thank the jury that they have viewed his outrage so leniently. There is not the least particle of justification apparent in the prisoner's act, and community, while he himself ought to exult, must regret that the criminal law of the country should be so mildly dispensed as in this case.

As to the instructions, we can perceive no error in them. Those given by the Court for the prisoner, are as favorable to him as he had any right to expect, or the law of the case allowed.

There being no error in the record, the judgment is affirmed.

Judgment affirmed.

NOTE.—On the subject of the defence of the habitation, it will not be necessary to say much in a note, since it will be seen from the above cases, that there has been no change in the law in this respect: the modern cases develop no rule of law that is new. It will be useful, therefore, to refer only to those distinctions which exist between defence of the habitation, or defence of the person within the habitation, and other instances of defence of person or property.

1. And first, the leading distinction between defence of or in the habitation, and other cases of personal defence, consists in the rule, that where a person is defending his house, or defending himself or his family, guests or dependants, in his house, he is not obliged to *retreat* before he can justify killing, as he ordinarily is in cases of defence in combat. The reason of this rule is, that in law, a man's house is his castle, or, as the old books express it, his *tutissimum refugium*; and, having retired thus far, the law does not expect him to yield further. 1 Hale P. C., 488; Pond's case, *ante*, p. 814; Carroll's case, *ante*, p. 804; State v. Patterson, 12 Am. Law Reg., N. S., 653; Haynes v. The State, 17 Ga., 483.

2. The second distinction relates to the difference between defence of the habitation and defence of *other property*. And here we encounter the principle that an attack upon a man's habitation is equivalent to an assault upon his person. Meade's case, *ante*, p. 798, note; Johnson v. Patterson, *supra*.

Therefore, if one kill another in resisting an attack upon his habitation, although the attack be not felonious, but in the nature of a trespass merely, the homicide is extenuated to manslaughter, and is not murder. Cook's case, Cro. Car., 537; 1 Hale P. C., 485-6; 1 East P. C., 321; State v. Patterson, *supra*.

On the other hand, an attack or trespass upon property *other than the habitation*, is not such a provocation as will reduce a deliberate killing to manslaughter. Harrison's case, *ante*, p. 71, and references; Drew's case, *ante*, p. 705; State v. Patterson, *supra*.

3. A third question relates to the defence of the habitation, against an unlawful breaking for the purpose of arresting the dweller or an inmate. And upon this subject we have already seen, *ante*, p. 716, that according to an ancient rule of the common law, an attempt unlawfully to arrest a person, is such a provocation as will reduce the killing of the person making the attempt, to manslaughter. The same principle, of course, obtains with greater force, where the officer or other person who seeks to make the arrest, attempts to break into the dwelling of the person whom he seeks to arrest. The killing of such a trespasser is manslaughter only. 1 Hale P. C., 458; 1 East P. C., 321; Drew's case, *ante*, p. 705; State v. Oliver, 2 Houston, (Del.,) 606. Unless, perhaps, there be evidence of express malice. State v. Oliver, *supra*.

The question, under what circumstances the protection of a dwelling extends to a person therein, so as to make it unlawful to break in for the

purpose of effecting an arrest which would otherwise be lawful, is one of considerable extent; and the limits which this volume has already reached, preclude us from entering upon its discussion. It may be briefly stated, however, that a leading distinction of the common law is, that the person seeking to make the arrest, cannot lawfully break the *outer* doors or *outer* windows of a habitation in order to effect such purpose, if the attempted arrest be under *civil process* only. 1 East P. C., 321. And the rule appears to be the same, where the breaking is to levy upon a man's goods under legal process. *Curtis v. Hubbard*, 1 Hill, (N. Y.), 336; S. C., 4 Hill, 437. This immunity does not, however, extend to arrests *in criminal cases*, where the arrest would be otherwise lawful. 1 East P. C., 321; *State v. Oliver*, *supra*; 1 Bish. Crim. Proc., §§ 653 *et seq.*; 1 Chit. Cr. Law, 51-59. Nor does it extend to the case of a person fleeing from arrest into the house of *another* person; for, in such a case, the house is not *his* castle, and the owner may not lawfully afford him asylum against the process of the law. 1 East P. C., 323.

4. A fourth question relates to the circumstances under which a man may defend the habitation of another; or under which the owner may defend others in his habitation. This question has been adverted to in a preceding subdivision. *Ante*, p. 738. While, as we have just seen, a person may not afford asylum in his habitation to another fleeing from the process of the law, though it be from civil process merely, yet the general principle, applicable, of course, to persons being lawfully in the habitation, undoubtedly is, that the guest may defend his host and the host his guest, to the same extent that either might defend himself. *Semayne's case*, 5 Coke, 91.

So, of course, a man may defend his family or servants. *Pond's case*, *ante*, p. 714. Or a servant his fellow servant. *Drew's case*, *ante*, p. 705. It seems, however, that a person who officiously conceals himself in the house of another, for the purpose of detecting a person in committing adultery with the wife of the owner, and kills the trespasser, is guilty of murder. *People v. Horton*, 4 Mich., 67.

6. It remains to consider what degree of force a man may use in expelling a trespasser from his habitation who entered lawfully or peaceably therein. He may use proper force after requesting the intruder to leave. 1 Bish. Cr. Law, 5th ed., § 859. He may not give him a kick to induce him to go. *Wild's case*, 2 Lewin C. C., 214. He may not use violence for that purpose, until he has first made a fair trial of gentle means. *McCoy v. The State*, 3 Eng. (Ark.), 454. And if, under such circumstances, the owner kills him, it seems he is guilty of murder. *State v. Smith*, 3 Dev. & Batt., 117. See also *Reg. v. Sullivan*, Car. & Marsh., 209. Referring to this head of our discussion, Mr. Bishop says: "The doctrine undoubtedly is, that cases like those mentioned in this section, must be determined by the principles which govern the defence of goods and estate, not by those peculiar ones which give to the party the right of killing another who attempts to break and enter his castle. This is a clear deduction of legal reason, though there appear to be no decisions precisely in point." 1 Bish. Cr. Law., § 859, 5th ed.

PART III.

DEFENCE OF PROPERTY OTHER THAN
THE HABITATION.

THE PEOPLE v. PAYNE.

[8 CAL., 341.]

Supreme Court of California, October Term, 1857.

DAVID S. TERRY, *Chief Justice.*

PETER H. BURNETT, } *Associate Justices.*
STEPHEN J. FIELD, }

DEFENCE OF PRIVATE PROPERTY AGAINST TRESPASSES AND FELONIOUS
ATTACKS.

1. The owner of property in the possession of the same, has a right to use as much force as is necessary to prevent a forcible trespass; and where a trespasser goes with the intent and with the means to commit a felony, if necessary to accomplish the end intended, the owner of the property may repel force by force, to the extent of killing the aggressor.

2. Where an armed trespasser goes to the place where the property of another is deposited, and, under a claim of right, attempts to remove it by force, and manifestly intends to kill the owner of the property if necessary to accomplish his purpose, and the owner shoots and kills such trespasser, this is excusable self-defence.

Appeal from the District Court of the Fifth Judicial District, County of Tuolumne.

Indictment and trial for murder, and conviction of murder in the second degree. At the trial, the counsel of defendant asked the Court to give the jury the following instruction in writing:

“If the defendant was in imminent danger of great

bodily injury from the deceased at the time of the killing, then they are to find him not guilty."

Which instruction the Court gave, with this verbal qualification:

"That the jury must take into consideration the intent of the defendant in going to the place of the alleged killing."

The defendant's counsel excepted to the giving of the instruction as modified, and assigns two grounds of objection:

1. That the instruction, *as qualified*, is too broad when considered with reference to the testimony.

2. That the qualification should have been given in writing.

The substantial facts of the case, concisely stated, were these:

There was a dispute existing between William S. Stone and defendant Payne, about a tract of land. The defendant had placed some posts upon the tract with a view to the construction of a fence. On the Friday before the killing, which occurred on the Monday following, a suit had been tried, and the case appealed. Stone and the deceased, J. H. Vaughn, who was employed by Stone, were engaged in hauling away the posts to keep Payne from doing it, and had removed two loads of the posts to Stone's corral. Payne, with a hand in his employ by the name of Rowe, went to the place where the posts were deposited, and Payne proposed to Stone to let the posts remain until the lawsuit was determined, and forbade him from moving them. Stone replied he would remove them. Payne then told him he must abide the consequences, and Stone replied he did not care what he said. Payne was armed with a single-barreled shot-gun, which he carried under his right arm, with the barrel resting on his left, and with the muzzle in the direction of Stone. Vaughn was armed with a pistol, which he carried in a belt around his body. Stone then changed his position, and said to Vaughn,

“give me that,” and Vaughn stepped around and said, “never mind.” Vaughn then said, “Stone, put on the posts; Payne, put up that gun,” and drew his pistol, when Payne fired and killed Vaughn.

Defendant appealed.

E. D. Baker, for appellant; *W. T. Wallace*, Attorney-General, for the People.

BURNETT, J., after stating the facts, delivered the opinion of the Court—TERBY, Ch., J., concurring:

From all the testimony taken together, it would seem clear that Stone and Vaughn went with the pre-determination to remove the posts by force, if necessary. It is equally clear, that Payne went upon the ground determined to prevent their removal, by force, if required. Whatever may have been the merits of the respective claims of each party to the land in dispute, the posts were the admitted personal property of Payne, and Stone had no right to remove them and appropriate them to his own use. The law-suit was still pending and undetermined, and the proposition of Payne to let the posts remain until the determination of the law-suit, was the most reasonable, and showed a desire then to avoid a difficulty. Whatever might have been the result of the suit about the land, the property in the posts would have remained in Payne, and he would have had the right to remove them at any time, by making good any damage occasioned by their deposit upon, and removal from the premises.

It would seem clear, that the act of Payne could not amount to manslaughter, for the reason, that this offence “is the unlawful killing of a human being without malice, express or implied, and without any mixture of deliberation.” Comp. Laws, 641. There was certainly deliberation on the part of Payne, and the offence, if any, was murder.

Justifiable homicide is defined by our statute to be “the killing of a human being in necessary self-defence, or in defence of habitation, property, or person, against

one who manifestly intends, or endeavors, by violence or surprise, to commit a felony," etc.

Under the circumstances of this case, the jury had to enquire whether Stone and Vaughn manifestly intended, or endeavored by violence, to commit a felony—and if so, whether the act of Payne was in necessary defence of himself or property. Stone and Vaughn knew that the property belonged to Payne, and the evidence goes clearly to show that they went with the determination to remove it to the premises of Stone, peaceably if they could, and forcibly if they must. The removal was determined upon, and their subsequent conduct depended upon contingencies. If the owner of the property resisted, they were prepared to use force to accomplish the trespass. It was not the intention or endeavor of Stone and Vaughn to commit a felony, in respect of the property, for they did not intend to steal it. Nor was it their intention to commit a robbery, for the felonious intent as to the property was wanting. But the felony they intended to commit was the killing of Payne, if necessary, to accomplish the removal of the posts. Payne being the owner of the property, and in possession of the same, had a right to use such force as was necessary to prevent a forcible trespass; and if in doing so, he was compelled to kill Vaughn, he was justifiable. If Vaughn had not been armed, and had simply attempted the trespass without force of arms, and neither intended nor endeavored to commit a felony himself, then Payne would not have been justified in killing him. But when the trespasser goes with the intent and with the means to commit a felony, if necessary to accomplish the end intended, the owner of the property may repel force by force.

The instructions given, did not place the real points arising under the testimony, fully before the jury.

The *verbal* modification was erroneous. It constituted a *part* of the instruction *as given*, and if the instruction itself must be in writing, each part composing it must also be in writing.

The act of May 7, 1855, is positive, and the decision of this Court, in the case of the People v. Beeler,^a July, 1856, is directly in point.^b

Judgment reversed, and cause remanded for further proceedings.

Judgment reversed.

^a 6 Cal., 246. ^b The same ruling on this last point was made in Payne v. Commonwealth, 1 Metcalf, Ky., 370.

GRAY v. COOMBS.

[7 J. J. MARSHALL, 478.]

Kentucky Court of Appeals, October, 1832.

(Names of the Judges not in the original report.)

DEFENCE OF PROPERTY BY SPRING GUNS—CIVIL AND PENAL CODE—
KILLING TO PREVENT CRIME—RESISTANCE OF FELONIES—SELF-DEFENCE
A NATURAL RIGHT.

1. In an action for damages for the killing of the plaintiff's slave, by means of a spring gun set for the protection of the defendant's goods, the lawfulness of such means of protecting private property is not to be determined by reference to the civil code alone, but it is to be determined by the whole law, whether as appearing in the civil, or in the penal code.

2. The rule, as laid down by Sir William Blackstone, that the law will not suffer any crime to be prevented by death, unless the same, if committed, would be punished by death, is misconceived, both as respects the rule itself and the reason of it. In most civilized countries, the authorized extent of resistance in the necessary defence of the person or property against the perpetration of crimes, must greatly exceed the amount of punishment prescribed by law for their perpetration.

3. It would seem that the right of killing to prevent the perpetration of crime depends more upon the character of the crime and the time and manner of its attempted perpetration, than upon the degree of punishment attached to it by law, or upon the fact of its being designated in the penal code as a felony or not. In the eye of reason and justice, the intrinsic nature of the offence, together with the time and manner of its attempted commission, must ever test the legality of the means resorted to for its prevention. [See Pond's case, *ante*, p. 814.]

4. The right of self-defence is not derived from society, but is a right which every individual brings with him into society, and retains in society, except so far as the laws of society have curtailed it.

5. Where a person has valuable property in a strong warehouse, well secured by locks and doors, it is lawful for him, as an additional security at night, to erect a spring gun which can only be made to explode by entering the house.

NICHOLAS, J., delivered the opinion of the Court:

To an action on the case, brought by Gray against Coombs, for killing a negro man slave, the latter pleaded in substance, that as clerk and store-keeper, he had the care and custody of a brick warehouse, containing a variety of goods of great value; that before the killing of said slave, some person having been in the habit of entering said warehouse, at night, and stealing goods therefrom, though well secured with good doors and locks, and the defendant not being able to apprehend said thief, for the protection of said property and prevention of such stealing, set up a loaded gun on the inside of the house, with a string tied to the trigger; that said slave, in the dead hour of the night, with the intent of stealing said goods, broke and entered said house, pushed against said string, and thereby caused the gun to go off and himself to be shot and killed, etc. To this defence the plaintiff demurred, and the Court having overruled the demurrer and given judgment for the defendant, the plaintiff prosecutes this writ of error. For the defendant, it is contended, that his act is only to be viewed in this suit, with an eye to the civil code, and the killing of the slave to be treated no otherwise than the killing of an ox under similar circumstances, and that if he has infringed any part of the criminal code, he must be left to a criminal prosecution for his punishment. This cannot be. If what he has done is illegal, he is none the less responsible to remunerate the master for the value of the slave, because he may also be responsible to the State for taking the life of a human being. His act, whether viewed civilly or criminally, must be adjudged of in all its consequences, according to its legality, and it is perfectly

immaterial whether the rule for testing its legality be found in the civil or penal code. But conceding the distinction attempted, we should, by no means, be prepared to concede the consequence deduced from it. A similar process of reasoning would justify the destruction of human life, in the prevention of any mere trespass, by the use of like indirection in the mode of defence.

For the plaintiff, it is contended, first, that the use of means calculated to produce death, by whatever indirection they may have been used, are as obnoxious to the censure of the law, and render the user as culpable, as if they had been used directly and immediately by himself. Second, that the theft or robbery attempted by the slave, if perpetrated, would have been no felony, but only a misdemeanor, punishable by stripes alone. Third, that the law does not allow the taking of human life, except for the necessary prevention of a crime, which, if committed, would be punished by the law with death.

The first of these propositions may well be conceded. The second is undeniably correct. By the 19th section of an act of 1802, 2 Dig. 1160, it is declared that a slave convicted of any other offence than murder, arson, rape, robbery from the person, and burglary, shall be sentenced to receive any number of lashes not exceeding thirty-nine. The third section of an act of 1806, 2 Dig. 1161, declares in substance, that any offence in a slave, for which stripes are imposed as the only punishment, shall be deemed a misdemeanor only.

In support of the third proposition, we are referred to the language used by Judge BLACKSTONE on this subject, 4 Bla. Com., 181. After citing the instances in which the law justifies killing to prevent the perpetration of various crimes, he alludes to another, which he makes no doubt may be equally resisted by the death of the unnatural transgressor. "For," says he, "the one uniform principle that runs through our own and all other laws, seems to be this, that where a crime which in itself is capital, is endeavored to be committed by force,

it is lawful to repel that force, by the death of the party attempting."

"The law of England, like that of every other well regulated community, is too tender of the public peace, too careful of the lives of the subjects, to suffer, with impunity, any crime to be *prevented* by death, unless the same, if committed, would also be *punished* by death."

If the law be as thus laid down, it is difficult, if not impossible, to escape the conclusion, that the act of the defendant in this case, was illegal, and he consequently responsible for the value of the slave. For as the crime would not, if committed, have been punished with death, it would, according to this rule, have been unlawful to kill him.

But we cannot accede to the correctness of this rule; no authority is cited in support of it, and we believe none, sufficient to sustain it, can be found. Its recognition, would singularly and essentially curtail the right of self-defence in this State, as heretofore supposed to be and long acted upon, with the approbation of all the virtue and intelligence of the community. In such a community, where the rights of self-defence are so dearly cherished and so well maintained by the sentiments of our population, it would not merely be with reluctance, but extreme regret, that we should acknowledge ourselves compelled to adopt or follow so restricted a rule.

The result would be, in the present state of our criminal code, that neither highway robbery, rape, nor a variety of other equally atrocious crimes could be lawfully prevented by the death of the aggressor. Indeed, we apprehend that it would be as futile, as unwise, for even the legislature to announce such a rule. Public sentiment is so decidedly and unalterably opposed to it, that it would be vain to attempt its enforcement. In vain would the way-farer be directed to surrender his horse and his purse to a robber, rather than protect them by the death of the assailant. In vain would juries be called on to punish with the gallows, a necessary defence

of female chastity. We fear not the imputation of temerity, in hazarding the opinion, that Blackstone has misconceived both the rule and the reason of it. In every civilized community, except where there prevails such a draconic code as exists in England, the authorized extent of resistance in the necessary defence of the person or property against the perpetration of crimes, must greatly exceed the amount of punishment prescribed by law for their perpetration. The final sanctions of all wise codes are framed in a spirit of true clemency, and with a view rather to deter from the commission and repetition of crime, than thoroughly to avenge an injury done. Much of the punishment is left to the conscience of the criminal, and to the ultimate avenger of all human crime. On the other hand, the right of necessary defence, in the protection of a man's person or property, is derived to him from the law of nature, and should never be unnecessarily restrained by municipal regulation. However proper it may be for every well ordered community to be tender of the public peace, and careful of the lives of its citizens, there can be neither policy nor propriety in extending this tenderness and care so far as to protect the robber, the burglar and the nocturnal thief, by an unnecessary restraint of the honest citizen's natural right of self-defence.

Sir Matthew Hale, in speaking on this subject, says, "the right of self-defence in these cases is founded in the law of nature, and is not, nor can be superseded by the law of society. Before societies were formed, the right of self-defence resided in individuals, and since, in cases of necessity, individuals incorporated into society, cannot resort for protection to the law of society, that law with great propriety and strict justice, considereth them as still in that instance, under the protection of the law of nature."

Indeed, Blackstone himself, 4 Com., 180, holds this language: "Such homicide as is committed for the prevention of *any forcible and atrocious crime*, is justifiable by the law of nature, and also by the law of Eng-

land, as it stood so early as the time of Bracton, and as it is since declared in statute 24 Henry 8, ch. 5." He then cites the Jewish law, which punishes no theft with death, yet justifies homicide in cases of nocturnal house breaking. "If a thief be found breaking up and he be smitten that he die, no blood shall be shed for him; but if the sun be risen, there shall blood be shed for him." He then cites the law of Athens, where if any theft was committed by night, it was lawful to kill the criminal if taken in the fact, and the transcription of the same law into the Roman twelve tables, and concludes thus: "Which amounts very nearly to the same, as is permitted by our own constitutions." Without attempting to reconcile this language with that first quoted, an apology may be found for the latter, in the fact that almost every *forcible* and atrocious crime is punished with death, by the laws of England, so that the rule as laid down by Blackstone, may there be strictly correct in its letter, though not in its spirit, or for the reason assigned by him. We have not had access to Bracton, to see the citation made from him by Blackstone, but have met with the following quotation from him in a note to Hale, 488: *Qui latronem occiderit, nocturnum vel diuturnum, non tenetur, si aliter periculum evadere non possit teneatur, tamen si possit.*

It is evident from the language used by Hale, (P. C., 484 to 489,) that he placed justifiable homicide upon the ground of the prevention of a felony, and not the prevention of a crime punished by death. After stating a case of justifiable homicide in defence of a third person, he says, "and the reason seems to be because every man is bound to use all possible lawful means to prevent a felony." Again: "In case of a felony attempted, as well as of a felony committed, every man is thus far an officer, that at least in killing the attempter in case of necessity, puts him in the condition of *se defendendo*, in defending his neighbor." "Now concerning felonies, as there is a difference between them and trespasses, so there is a difference among themselves, in relation to the

point of *se defendendo*. If a man come to take my goods as a trespasser, I may justify the beating him in defence of my goods, but if I kill him it is manslaughter. But if a man come to rob me or take my goods as a felon, and in resisting I kill him, it is *se defendendo* at least, and in some cases not so much."

He further says that the statute, 24 Henry 8, ch. 5, was but declarative of the law as it stood before, and to remove a doubt, and puts the killing a robber in or near a highway, etc., in the same condition with one that intends to rob or murder in the dwelling-house, and exempts both from forfeiture.

Foster, p. 273, says, "a party may repel force by force, in defence of his person, habitation, or property, against one who manifestly intendeth and endeavoreth, by violence or surprise, to commit a known *felony* on either."

From these authorities, and what we deem to be the reason of the law, it would seem, that the right of killing to prevent the perpetration of crime, depends more upon the character of the crime, and the time and manner of its attempted perpetration, than upon the degree of punishment attached to it by law, or upon the fact of its being designated in the penal code as a felony or not. A name can neither add to, nor detract from, the moral qualities of a crime, and in the eye of reason and justice, the intrinsic nature of the offence, together with the time and manner of its attempted commission, must ever test the legality of the means to be resorted to for its prevention. It is not absolutely necessary, however, for the purposes of this case, to do more than place it on the ground of the prevention of a felony.

For, though the robbery attempted in this case would only have been a misdemeanor in a slave, yet, in a white person, it would have been a felony; and, therefore, though according to strict law, it may not have been a justifiable means of prevention as against a slave, such being known to be the character of the thief, yet, in the absence of such knowledge, we would suppose a resort

to such means justifiable, as is permitted against the general, more numerous, and worthier class of the community, and the circumstance of the calamity lighting upon one of the other class, is to be taken as misadventure.

Whatever cavils may be entertained against such a course of reasoning, we should feel little hesitation in resorting to it, if necessary, to render slaves liable to all the same perils that whites incur in nocturnal depredations, and justifying as against them the same means of defence as against whites. The crime is of the same moral dye in each, and neither justice nor policy would allow the inculcation of a resort to the necessary means of prevention against its perpetration by one, and not by the other, merely from the circumstances that the offence when committed by one, is designated in our code by a different name than when committed by the other.

The right of punishing crimes, and the infraction of individual rights, may well be presumed to be surrendered by every man to the whole community, when he enters into civil society. The well being of society requires it. Not so, however, as to the right of defence. Its possession and exercise are still necessary to individual security, and not incompatible with the public good. It is true, society may curtail this right, and, no doubt, does restrain its exercise in many important particulars. But it is emphatically a right brought by the individual with him into society, and not derived from it. He consequently retains the plenary right, except so far as it has been restrained by the laws of society. The extent of the right of defence is necessarily undefined by the law of nature. Its only limit is necessity. "That law," says Rutherford, "allows us to defend our persons or property, and such a general allowance implies, that no particular means of defence are prescribed to us. Whatever means are *necessary*, must be lawful, because it would be absurd to suppose that the law of nature allows of defence, and yet forbids us at the same time, to do what is necessary for this purpose. It follows, that he

who attempts to injure us, gives us an indefinite right over his person, or a right to make use of such means to prevent the injury, as his behavior and our situation make necessary."

He also says: "The right of defending our goods is an indefinite one, and that we are not naturally debarred from proceeding to extremities in their defence, where the obstinate injustice of those who would deprive us of them renders this necessary." The same author also vindicates such defence of our goods as may end in the death of him who attempts to take them from us, as consistent, not merely with justice, but with benevolence also.

This, however, is a question for casuists. It is one with which we have little to do. Our enquiry is limited to ascertaining, whether our municipal code has restrained the natural right of defence so far as to inhibit what the defendant has done in this case. We cannot find that it has. So far as we know, there has been no authoritative precedent for so saying. We are not at all disposed to make such a precedent.

It is not necessary in this case, nor shall we, therefore, attempt the difficult and delicate task of defining how far, and in what instances, the law of society has restrained the right of defence for the security of the lives of our citizens from the wanton cruelty and guileful malice of those who might otherwise indulge their evil passions under the guise of protecting property. We shall content ourselves with saying the restraint does not, and should not, extend to this case. That where a person has valuable property in a strong warehouse, well secured by locks and doors, he may, as an additional security *at night*, erect a spring gun which can only be made to explode by entering the house. That the defence used by the defendant was, therefore, lawful, and the calamity which ensued, ascribable to the slave's own act. We know of no process by which the defendant could have obtained the protection of the law against an unknown thief. The law did not require him to hire a

guard for its protection. Neither was he bound to leave it to the spoliation of nocturnal depredators. The time and circumstances constituted a case of necessity, that legitimated the means resorted to.

This conclusion is sustained by the respectable authority of Rutherford, in his Institutes, 336. "Some injuries of a lower order," says he, "though not irreparable in their own nature, are so by accident. There is the same reason why a man should be at liberty to defend himself against these, as there is, why he should be at liberty to defend himself against those of a higher order, where he can have no assistance from civil jurisdiction. Of this sort we may reckon the loss of goods, where the person who attempts to steal them is unknown; or where, though he is known, there is a moral certainty that the public can never interpose, so as to obtain the restitution of them. The rules that ought to be observed in these circumstances, are the same as ought to be observed in a state of nature. And where the law of nature would justify a man, considered as an individual, in proceeding to extremities, the same law will justify him in taking the same measures, though he is a member of society." Meaning, of course, as we presume, except so far as restrained by the ordinances of society. As before stated, we know of no law restraining the right as exercised in this case. We have been unable to find any case in which this question has come before any of the courts in America, or any English court, prior to the revolution. But in the case of *Plott v. Wilkes*, 3 Barn. & Ald., 304, it was decided by the court of King's Bench, that a person might lawfully place loaded spring-guns in enclosed grounds to prevent depredations; and the plaintiff in that case, who had received severe bodily injury, whilst gathering nuts, from a gun so placed, was non-suited. It is true, the plaintiff had notice of the gun's being in the woods, but that seems not to have been treated as a controlling circumstance, for it is conceded by the court, that if the setting of the guns had been unlawful, notice to the plaintiff would not have exempted

the defendant from liability. We are not called on now to give our dissent or assent to the principle ruled in this case, but mention it for the double purpose of showing the extent to which such means have been permitted in England, for the protection of property, and of authorizing a suggestion of the propriety of legislative interposition, for the restraining within due and proper bounds, the exercise of any such right. The determination in *Hott v. Wilkes* was, no doubt, the occasion of the passing of the act of the British Parliament, 7 and 8 Geo. 4, ch. 18, which declares, "that if any person shall set or place, or cause to be set or placed, any spring gun, man-trap, or other engine calculated to destroy human life or inflict grievous bodily harm, with the intent that the same, or whereby the same may destroy or inflict grievous bodily harm upon a trespasser or other person coming in contact therewith, the person so setting or placing, or causing to be set or placed, such gun, trap or engine as aforesaid, shall be guilty of a misdemeanor. Provided, that nothing in this act shall be deemed to make it a misdemeanor within the meaning thereof, to set or cause to be set, from sunset to sunrise, any spring gun, man-trap or other engine, which shall be set in a dwelling-house for the protection thereof."

The judgment must be affirmed, with costs.

Judgment affirmed.

JOHNSON v. PATTERSON.

[14 CONN., 1.]

*Supreme Court of Errors of Connecticut, July
Term, 1840.*

THOMAS SCOTT WILLIAMS, *Chief Justice.*

SAMUEL CHURCH,
HENRY MATSON WAITE,
ROGER MINOTT SHERMAN,
WILLIAM LUCIUS STORES, } *Judges.*

**PLACING POISON TO DESTROY ANIMALS—RIGHT TO DEFEND PROPERTY
BY POISONS, ENGINES, ETC., IN THE OWNER'S ABSENCE.**

1. Where the defendant, to prevent the plaintiff's fowls from trespassing on his land, as they had before done, mixed Indian meal with arsenic, and spread it upon his land, having given the plaintiff previous notice that he should do so; and such fowls coming afterwards upon the defendant's land, ate the poisoned meal, in consequence of which some of them died; it was held, 1, that previous notice, in contradistinction to notice after the fact, was sufficient; 2, that notwithstanding such notice, the defendant was not justified, in the use of deadly means, and consequently, was liable in damages.

2. The right of an owner to defend his property in his absence, by means of engines or poisons placed so as to kill or injure trespassing men or animals, discussed at length upon principle and in view of the English authorities; and it is held, that no such right exists in Connecticut.

3. The doctrine of this case is limited to cases of trespass merely. What may be done to prevent a *burglary* or other *felony*, is admitted to be governed by other rules. [As to which, see the preceding and also the following case.]

4. The case of *Hott v. Wilkes*, 3 Barn. & Ald., 304, criticized and disparaged; and the grounds of public policy adduced in support of the rule declared in that and other similar English cases, declared to have no force or application in Connecticut.

The original action was trespass, brought by Henry Patterson against Sheldon C. Johnson, to the County Court of New Haven county, for killing and destroying ten hens and chickens, the property of the plaintiff. There was also a special count *in case*, for the same injury.

On the trial before the County Court, November Term, 1839, the plaintiff offered evidence to prove, and claimed to have proved, the allegations in his declaration. The defendant claimed to have proved, by proper evidence introduced for that purpose, that he had been, for a long time, trespassed upon by the plaintiff's fowls coming upon his land, and destroying the seeds therein planted, and the vegetation thereon growing; that to prevent a repetition and continuation of these trespasses, he prepared Indian meal, mixed with arsenic, and scattered it upon his land, having first informed the plaintiff, that such a preparation would be placed there, and that the plaintiff must confine his fowls, or in some other way prevent them from trespassing upon his land again, otherwise they certainly would be poisoned; that after such notice, the meal so prepared was immediately scattered on the defendant's land; and the plaintiff, still neglecting to confine his fowls, or to prevent their coming upon the defendant's premises, they trespassed thereon, and while so trespassing, ate the Indian meal so prepared, and some of them died thereafter in consequence of it; which, the defendant claimed, was the same injury for which the plaintiff sought to recover damages. And the defendant claimed, that if these facts were satisfactorily proved, he was justified; and that the Court should so charge the jury. The defendant further claimed, that he might lawfully scatter poisoned meal upon his own premises, without any notice to the plaintiff.

The Court charged the jury, that unless the defendant had given full and ample notice to the plaintiff after the poisoned meal had been laid, the defendant could not be justified; and that no previous notice of his intention so to prepare and leave the poisoned meal, could be sufficient; and refused to charge the jury, that the defendant had a right to scatter it without notice.

The jury returned a verdict for the plaintiff. The defendant filed a bill of exceptions to the charge, and thereupon brought a writ of error in the Superior Court,

which was reserved for the consideration and advice of this Court.

O. A. Ingersoll and *Blackman*, for the plaintiff in error, contended—

1. That no person can lay the foundation of an action for damages in case, for an injury to his property, by a wrong on his part, or by neglect or breach of duty. To entitle a plaintiff in an action of this sort to recover, he must be free from fault. 1 Swift Dig., 551, 553; *Wadhurst v. Damme*, Cro. Jac., 45; *Blyth v. Topham*, Ib., 158, 159; *Brock v. Copeland*, 1 Esp. Rep., 203; *Butterfield v. Forrester*, 11 East, 60; *Burckle et al. v. New York Dry Dock Company*, 2 Hall, 151; *Bush v. Brainard*, 1 Cowen, 78; *Rathburn et al. v. Payne et al.*, 19 Wend., 399; *Deane v. Clayton*, 7 Taunt., 489; *Ilott v. Wilkes*, 3 Barn. & Ald., 304; *Sarch v. Blackburn*, 4 Car. and Pay., 297; *Curtis v. Mills*, 5 Car. and Pay., 489.

2. That the plaintiff was in fault in permitting his fowls to trespass on the defendant's land, after the notice given.

3. That the defendant had a right to protect his property by the acts which it is claimed were done. *Mahan v. Brown*, 13 Wend., 261. This case is not like that of *Townsend v. Wathen*, 9 East, 277.

4. That the charge was not as it should have been, on another ground. In some cases, the defendant would have a right directly to *kill* the plaintiff's animals trespassing, if the killing was *necessary* to protect his property. *White v. Ward et al.*, 9 Johns. Rep., 232; *Vere v Lord Cawdor et al.*, 11 East, 568; *Wadhurst v. Damme*, Cro. Jac., 45. If the same principles are to be applied to the killing by means of poisoned meal, as would be applied to a direct killing, the charge was wrong; as, in such a case, the defendant would have a right, *if necessary*, of which necessity the jury are to judge; and this should have been submitted to them.

C. B. Phelps, for the defendant in error, contended—

1. That the maxim, *Sic utere tuo ut alienum non lædas*, was applicable to and governed the present case. *Townsend v. Wathen*, 9 East, 277; *Deane v. Clayton*, 2 Marsh., 577; S. C., 7 Taunt., 489.

2. That the facts proved by the original defendant did not constitute a justification. The poisoned meal afforded no remedy for past injury, and was not a preventive of present aggression. It could only operate as a preventive of future mischief, by the destruction of the instruments of its accomplishment. But the poisoning of animals is a public offence, and involves the infraction of a private right. *Commonwealth v. Leach et al.*, 1 Mass. Rep., 58.

3. That the charge was unexceptionable with regard to *notice*. A *prospective* notice would be nugatory—a forewarning of possible evil—a mere threat. Notice *after* the fact shows the presence of actual danger.

SHERMAN, J., delivered the opinion of the Court:

This is not a case in which the destruction of the plaintiff's property resulted from acts done by the defendant, in the ordinary use of his own, without any intention to do the injury complained of; as in *Blyth v. Topham*, Cro. Jac., 158, where a stray horse fell into a pit made by the defendant in the common; or in *Bush v. Brainard*, 1 Cowen, 78, where the cow of the plaintiff, trespassing on the defendant's land, was killed, by drinking maple syrup in the defendant's sugar works. In this case, the defendant scattered the poison in his enclosure with intent to kill the plaintiff's fowls, if they should again trespass on the place. Being of opinion that the notice given by the defendant immediately before the poisonous article was put on the land, was sufficient, the only important question is, whether the defendant, having given such notice, offered in evidence a sufficient justification. If the jury have found the verdict, which they ought ultimately to give, the final judgment must

be affirmed, although the Court erred in regard to the sufficiency of the notice.

By the settled principles of the English law, the degree of force which may be employed in defending one's person or property, when present, is well defined, and admits of no controversy. It is entirely and exclusively *defensive*. If a man makes an assault on the person of another; or enters his house and refuses to go out, when ordered; or enters on his land; or in any way attempts a mere trespass on his property, real or personal, by force; so much force as is necessary to repel or prevent injury, or remove the trespasser, may be employed. There is no doubt that if A. is trespassing on the land of B., the latter, when present by himself or his servants, may, after notice to depart, use such reasonable force as is necessary for his removal. He may use like force to expel another's beast from his land, or he may seize and impound it. But he has no right, by the English law or our own, when present, in such a case to destroy life, or inflict permanent injury, or use greater force than is necessary for removal or prevention. This is admitted. The right to kill a bull or other furious beast from which one's person is in present danger; or a dog chasing sheep or other animals of property, so that they are exposed to harm; or a dog seen at large, which is accustomed to bite mankind; is an exception to this rule. *Wadhurst v. Damme*, Cro. Jac., 45; 1 Saund., 84, note (3); *Leonard v. Wilkins*, 9 Johns. Rep., 233; *Putnam v. Payne*, 13 Johns. Rep., 312; 1 Freem., 347.

But in England, it has long been usual for the proprietor of land to place spring-guns and other deadly engines upon an enclosure, so concealed as not to be seen, to wound, kill or destroy any man or animal that comes upon the place; and it is there held that if proper notice be given, he is justified in inflicting any injury upon men or animals trespassing upon the grounds, even to the taking of life. Thus, in the case of *Hott v. Wilkes*, 3 Barn. & Ald., 304, decided in 1820, the plaintiff was gathering nuts on the woodland of the defendant, upon

which nine or ten spring-guns were concealed, and was wounded in consequence of treading on a wire, communicating with a loaded spring-gun. He had notice that these guns were set in the wood. The Court held the defendant justified, and judgment was given in his favor. It was admitted that, in such a case, if the defendant had been present, he could not have used a dangerous weapon, nor have inflicted any wound upon the plaintiff. It was said by BEST, J., that although one could not, without pain, decide against the action, where the injury suffered by the plaintiff was extremely severe, yet we must not allow our feelings to induce us to lose sight of the principles which are essential to the rights of property. The prevention of intrusion upon property is one of those rights; and every proprietor is allowed to use the force which is *absolutely* necessary to vindicate it. "If he uses more," said he, "than is *absolutely* necessary, he renders himself responsible for all the consequences of the excess." But it was held, that when the owner is absent, resort to these severe measures becomes necessary; that although it be a maxim of law that a man cannot do that indirectly which he cannot do directly, yet that was not applicable. "For," says Justice HOLROYD, "where the plaintiff had express notice that the spring-guns were placed on the premises into which he wrongfully entered, the act of firing off the gun which was the cause of the injury, was *his act*, and not the act of the person who placed the gun there." (p. 300, Amer. ed.)

This is a summary of the principles applied by the English jurists, in support of the rule as held in that country.

In Connecticut, this case has not, to our knowledge, been decided. It is certainly of very great importance. Upon the principles adopted in England, no distinction is made between the various kinds of property which a party may injure or destroy by spring-guns, or other similar devices. If the fowls in question may be shot or poisoned, so may horses, oxen and other valuable

animals which will sometimes stray into a neighbor's field, notwithstanding the prudent vigilance of their owner. Indeed, the rule expressly authorizes not only the destruction of all kinds of animals, but of human life. Our people, hitherto, have never, by their usages, acknowledged this to be the common law of the State; and its adoption, in its full extent, would tend to impair the moral sense, and that tender regard for the lives and property of others, for which they are distinguished, and which ought to be cherished as essential to the virtue and harmony of society. Whoever has examined the English common law upon this subject, must be satisfied that its origin has been aristocratic and feudal, and the offspring of the peculiar state of society which existed there centuries ago. 2 Black. Com., 417. It arose from the same spirit; and is part of the same system as their game laws, which have long been considered by many of their soundest jurists, as an anomaly in their admirable system of municipal jurisprudence. Mr. Justice WILLES says, "nothing can be more oppressive than the present system of the game laws." (1 Term Rep., 49.) And Blackstone, speaking of the same subject, says: "Yet, however defensible these provisions in general may be, on the footing of reason, or justice, or civil policy, we must, notwithstanding, acknowledge that, in their present shape, they owe their immediate origin to *slavery*." The various statutes, enacted from time to time, relative to the qualifications for killing game, from the 1 Rich., 2, the first in the series, which prohibited every man, not having lands or tenements of the value of forty shillings a year from keeping any hound, or any other dog to hunt; or any engines to take or destroy hares, conies, or other *gentlemen's game*, on pain of a year's imprisonment, enacted in 1393, down to the 22 Car., 2, which raised the requisite qualification to £100 a year, are all of the same spirit. They deprived every unqualified person of the right to hunt, even on his own land. At a still earlier period, the protection of the forests, and of the privilege of hunting, was an object of

such interest, that trespassers on the king's forests were punishable with death, and by putting out their eyes, and other bodily tortures. From this, the law in question had its origin; and although the Charter of Forests, granted in the reign of Henry III, abolished the punishment of death for offences in forests; yet the common law, permitting individuals to inflict death by spring-guns and other deadly means, is still in operation. In the case already cited, Justice BEST, who considered the plaintiff as justly shot for the harmless liberty he had taken to gather nuts in a forest, expressly urges in support of his opinion, the importance of protecting the *hunting grounds*. He speaks of it as interwoven with the highest interests of the nation. "Much money," says he, "is expended in the protection of game; and it would be hard if, in one night, when the keepers are absent, a gang of poachers might destroy what has been kept at so much cost. If you do not allow men of landed estates to *preserve their game*, you will not prevail on them to reside in the country. Their poor neighbors will thus lose their protection and kind offices; and the government the support that it derives from an independent, enlightened and unpaid magistracy." How different is the state of society in Connecticut? Is there here any danger that great landholders will retire from the country; or that the poor will lose protection, or the State its magistracy, unless men are indulged in the use of deadly engines for the protection of game? Except for these grand considerations of public policy, on which this right of protecting property is grounded, it would never have had existence by the law of that country; and, happily, they are utterly inapplicable to this.

But we will consider more particularly, some of the chief grounds on which this severe rule is held, in the English courts, to be sustained by legal principles.

It is said to be "absolutely necessary for the protection of property in the absence of the owner."

If this be true at all, it must be in relation to that

kind of property only, which in England, is the chief object of this sort of protection. It has never been adopted in this State; and the ordinary protection of fences as required by statute, and redress by impounding, and suits at law, have been found sufficiently effectual for almost every sort of intrusion upon real estate. In this very case, an action for damages would probably have prevented trespasses in future. But if further protection is necessary, in regard to winged animals, and others, which fences cannot restrain, and whose owners cannot be easily ascertained, it had better be made by the legislature, and limited to the exigencies which require it. The English rule, if recognized as the law of this State, must be extended to every case which falls within its principles, and cannot be limited by the Court in its application.

That a man shall not do indirectly what he cannot do directly, is an acknowledged maxim of the English law, and of our own. The reasoning which excludes its application to this case, is very inconclusive. The argument is, that the trespasser, having full knowledge of the danger, goes into it voluntarily, and personally inflicts the injury on himself. It is not done, even indirectly, by the owner of the enclosure.

So far as this applies to taking human life, it proves too much. A man who should furnish suicides with the means of self-destruction, would justly be considered as partaking of the crime of homicide, however voluntarily or rashly they were bent on its perpetration. To prevent the commission of a *felony*, the law of necessity applies; and on that ground, a man in such case may, when present, justify personal violence, which would not be admissible in the case of a simple trespass. The argument admits this, but attempts to make a distinction, on the ground that he is not the agent who sets the spring-gun, but he who fires it off.

But what is the agency of the trespasser in such a case? Does he *voluntarily* pull the wire of the spring-gun? Is it his intention to be shot? The question must

be answered in the negative. It must be admitted that his intention is to commit a simple trespass only, and he will, if possible, avoid the injury to which he is exposed. So far as his intentions are concerned, the discharge of the gun is accidental and against his will. He knew, indeed, that by his own act he was exposing himself to death; but that catastrophe he meant, if possible, to avoid. But what was his intention who set the gun? It was to subject the trespasser to whatever injury he might suffer, if he trod on the wire. Here is an agency accompanied with intention; and that intention is accomplished, if the event happens. This transaction, in the English view of it, does not differ from one which is admitted to be illegal. The owner of a hundred acre field gives notice that he shall be there, at a given time, with a loaded gun, and shall fire on any trespasser who shall enter his lot. The threat is executed. The trespasser entered in his own wrong, with full knowledge of his danger, but with hopes of avoiding injury. In both cases, what the trespasser does, is intended. In neither, has he any design to inflict injury on himself. His will has no more agency in discharging the gun in the one case than in the other. In both, the owner intended what took place, and voluntarily arranged the necessary means for its accomplishment. If A. sets a spring-gun in his field, where his neighbor has a right of way, and the latter, with full notice, passes and receives a wound, it is admitted that A. is liable; but it is contended, that in the former case, the trespasser was *in the wrong*; but in the latter, the neighbor had a right to be upon the land. But the question is not which was in the wrong, but which did the act. The agency and the guilt of trespassing, are distinct things. He who set the gun and he who sprang it, had, respectively, the same agency in each case; and if that alone will excuse in one case, it will in the other. If the guilt of the sufferer is alleged as justifying the act, in one case, then let that be the test in both. With that test, we shall excuse the man who was travelling on his own right of way, and con-

damn the trespasser; but we shall not be embarrassed with the idle distinction between the agency of the sufferer, in the one case, and in the other. The plain enquiry will be, whether the acknowledged wrong of the trespasser was such as authorized the infliction of the injury; and if it did not, we shall attribute the act of discharging the gun, to him who placed it there for that purpose; and judge of his responsibility accordingly. Now, it is fully admitted by every English jurist, that the act of the trespasser does not authorize the infliction of the injury, by the hand of the owner of the land, when present, on either man or beast. But the *guilt* of trespassing upon the land is no greater in the absence of the owner, than when he is present. Its character, in the eye of the law, is that of a trespass only, and not a crime in either case. If the guilt is not such as justified the injury, how is the justification strengthened by the manner of inflicting it? But in order to vindicate the means long used by land holders for the protection of game, and show their consistency with legal principles, the English judges have adopted theories which are exceedingly refined. If A. stands by, while the trespasser treads on the wire, although he does nothing, he will be liable for the damage, because the act is his own. But if he leaves the place, after having arranged the machinery, fully intending to effect the same injury, and the trespasser is shot, in the same way, they say it is not the act of A., but that of the trespasser, and A. is innocent. In this case, if the defendant, after scattering the poisoned meal, had returned to his garden, and seen the fowls devouring it, the act, as is admitted, would be his own, and he would be subjected in this suit, unless he did all in his power to prevent the injury; and the only ground on which his justification can be placed is, that he left the meal, and that it was eaten in his absence. Had he been present, *he* would have poisoned the fowls; but as he was not present, it was the act of the plaintiff. The opinion of Mr. Justice HOLBOYD explicitly presents this distinction. He says, "if the de-

fendant had been present, and had seen a trespasser enter, and had the means of preventing the injury, and had not done all in his power to prevent it, *unquestionably*, it might have been considered as proceeding from his own act; but in the present case he was absent, and had not the means of averting the mischief; and *therefore*, the maxim of law that a man cannot do indirectly what he cannot do directly, is not applicable to the present case." (p. 300, Amer. ed.) This seems to involve the proposition, that a man is responsible for not guarding against the *intended* consequences of his own *innocent* act; and, if he does not, that shall be considered as his own act, which is the act of another.

Much stress is laid, by the English judges, in various cases, upon the argument, that the trespasser incurs the evil which he suffers, by entering, or permitting his creatures to enter, upon another's land, with full knowledge of the impending injury; and, of course, must attribute the consequences to his own voluntary act. Whatever he suffers, be it death itself, is of his own procurement.

Were this reasoning sound, it would supersede the necessity of complicated codes of criminal law. The punishment of death might justly be inflicted for every offence. The offender can always avoid the punishment if he pleases; for no man is punished but for the voluntary violations of known law. Such a code would be, on some accounts, more tolerable than the law in question. This warrants death for a mere trespass; that for crimes only. There, the trial is by a jury of men; here, death is inflicted without the interposition of any intelligent being. The malignant poacher and the poor insane wanderer are equally liable to become the victims.

It has been assumed in the preceding remarks, that the common law of England is in favor of the right of the defendant to take the measures he did to protect his land from the plaintiff's fowls. It is true, that spring-guns and other destructive means have been immemorially used in that country. The particular grounds, how-

ever, on which this assumption is made, are of very recent origin. It was never decided by their courts, that the proprietor of land could vindicate himself for any injury to the person or property of another, by means of dangerous engines, until 1820, in the recent case of *Hott v. Wilkes*, already cited. Three years before, the same question was agitated in the Court of Common Pleas, and very elaborately debated in *Deane v. Clayton*, 7 Taunt., 489. The action was for the loss of the plaintiff's dog, which was killed by running against a dog-spear, while chasing a hare, on the defendant's land. The spear was fixed to a tree to destroy dogs and foxes and protect the game. After great deliberation, the judges were equally divided in opinion, on the general question, as well as on some minor points involved in the case. In the course of those discussions, the learned counsel and judges thoroughly examined the authorities; and, although they derived arguments and inferences from decided cases, yet the main question was on all hands, admitted to be new. As the Court was equally divided, no judgment was rendered. The unanimous opinion of the King's Bench, in the case of *Hott v. Wilkes*, is of binding authority in that Kingdom. Except for the preservation of game, such engines appear to be little used in that country, and, for the same purpose, would be of no use in this. The opinions of those judges who hold that the law will not justify a man in causing injuries by such means, which he cannot inflict directly, with his own hands, are sustained by the settled principles of the common law.

We cannot justify the defendant in committing the comparatively small trespass of which the plaintiff complains, upon any principles which have been admitted in this State, or which we can reconcile with those just provisions of the English common law, which we have already incorporated into our own, in regard to the means which may be used to prevent a simple trespass. The case does not involve the enquiry, what may lawfully be done to prevent a burglary or other felony.

Cases of that character are governed by other and well settled rules.

We advise that the judgment of the County Court be affirmed.

In this opinion, the other judges concurred.*

Judgment affirmed.

* See *Birge v. Gardiner*, 19 Conn., 501, where this case is cited by the Court. *Burns v. Housatonic R.R. Co.*, 19 Conn., 567; *Hyke v. VanLeuwen*, 4 Denio, 127; S. C., 1 Comst., 515; *Clark v. Syracuse and Utica R.R.*, 11 Barb., 112.

STATE v. MOORE.

[31 CONN., 479.]

Supreme Court of Errors of Connecticut, April Term, 1863.

JOEL HINMAN, *Chief Justice.*
 DAVID CURTIS SANFORD,
 THOMAS BELDEN BUTLER, } *Judges.*
 HENRY DUTTON,

DEFENCE OF PROPERTY BY SPRING-GUNS, ETC., IN THE ABSENCE OF THE OWNER—SPRING-GUNS AS A NUISANCE—RIGHT TO TAKE LIFE IN DEFENCE OF PROPERTY.

1. The mere act of setting spring-guns on one's own premises for their protection, is not unlawful in itself, but the person doing it may be responsible for injuries caused thereby to individuals, and may be indictable for the erection of a nuisance, if the public are subjected by it to any danger.

2. What a man may not do directly, he may not do indirectly. A man may not, therefore, place instruments of destruction for the protection of his property where he would not be authorized to take life with his own hand for its protection. [Acc. *Johnson v. Patterson*, *ante*, last case; and see *Gray v. Coombs*, *ante*, p. 867.]

3. The right to take life in defence of property, as well as of person and habitation, is a natural right; but the law limits its exercise to the prevention of forcible and atrocious crimes, of which burglary is one. [Acc. *Gray*

v. Coombs, *ante*, p. 867, Pond's case, *ante*, p. 814; Oliver's case. *ante*, p. 725, and note, p. 732.]

4. In the absence of any statutory provision making it burglary to break and enter a shop in the night-time with intent to steal, and by the early strict rules of the common law, a man may not take life in the prevention of such a crime.

5. The habits of the people and other circumstances, have, however, so greatly changed since the ancient rule was established, that it is very questionable whether, in view of the large amount of property now kept in warehouses, banks, and other out-buildings, it should not be held lawful to place instruments of destruction for the protection of such property. [Acc. Gray v. Coombs, *ante*, p. 867.]

6. Breaking and entering a shop in the night-season with intent to steal, is by the law of Connecticut, burglary; and the placing of spring-guns in such a shop for its defence, would be justified, if the burglar should be killed by them.

7. The guns would, however, constitute a nuisance, if they cause actual danger to passers-by in the street; but the danger to the public must be of a real and substantial nature.

8. Where, upon a prosecution for a nuisance, the jury, by a special verdict, found that the defendant placed spring-guns in his shop for its protection against burglars; that the guns were loaded with large shot, and so placed as to discharge their contents obliquely towards the highway, the travelled path of which was about a rod and a half from the shop; that the shop was lathed and plastered on the inside and double-boarded on the outside, but that it was possible that scattering shot might pass through the boards at places where, by reason of the cracks between them, there was not a double thickness of boards; and that the travelling public were annoyed and apprehensive of harm from the guns; it was held that it did not appear that there was such real and substantial danger to the public as to warrant a conviction.

Information for a nuisance by the defendant in placing spring-guns in his shop for its protection against burglars, by reason of which the public were endangered in passing by upon the adjacent highway. The jury returned the following special verdict:

"In this case, the jury find the following facts:

"The defendant owned and occupied a blacksmith's shop, adjoining a public highway in Colebrook, about one and a half rods from the travelled path. It had been entered by burglars, and subsequent efforts made to enter it again. The defendant, for the purpose of protecting his premises, placed at divers times three loaded guns, loaded with powder and large shot, when leaving

and locking the shop at night, with strings attached to the triggers, and extending to other objects, with intent that persons who should enter or attempt to enter said shop in the night season, should fire said guns, and kill or injure themselves thereby. One or more of said guns were pointed obliquely towards the said highway. The shop was lathed and plastered on the inside, and double boarded on the outside; but it was possible that scattering shot might pass out through the places where the boards, by reason of cracks between them, did not make a double thickness of boarding. The travelling public having occasion to pass upon said highway, were annoyed and alarmed, and apprehensive of danger from an accidental discharge of said guns, and some of them remonstrated with the defendant. The defendant gave notice of the placing of said guns to the public. The defendant had no intent to endanger and annoy the public on said highway, but acted with the sole purpose and intent of protecting his property in said shop from burglars, supposing he had a lawful right so to do; and upon the commencement of this prosecution, he desisted from placing said guns as before. And thereupon the jury find that if upon the facts so found, a verdict and judgment of guilty can be legally rendered, the defendant is guilty; but if said facts will not authorize in law a verdict and judgment of guilty, then we find the defendant not guilty, and submit the question as a question of law to the Court."

The questions of law arising on this verdict were reserved for the advice of this Court.

Sedgwick, State's Attorney, and *Goodwin*, for The State, cited 1 Hale P. C., 473; Foster C. L., 291; 2 Bish. Crim. Law, §§ 558, 597; 1 Russ. Crimes, 519, 545; 3 Chit. Crim. Law, 627, 641, 647; 4 Bla. Com., 167, 181; State v. Morgan, 3 Ired. (Law), 186.

Hall, with whom was *Hitchcock*, for defendant, cited 1 East P. C., 219, 271; 1 Hawk. P. C., 108; Foster C. L., 273; 1 Russ. Crimes, 550; 1 Hale P. C., 445, 481, 484; 2

v. Coombs, *ante*, p. 867, Pond's case, *ante*, p. 814; Oliver's case, 725, and note, p. 732.]

4. In the absence of any statutory provision making it burglary and enter a shop in the night-time with intent to steal, and by strict rules of the common law, a man may not take life in the commission of such a crime.

5. The habits of the people and other circumstances, have greatly changed since the ancient rule was established, that it is questionable whether, in view of the large amount of property in warehouses, banks, and other out-buildings, it should not be placed to place instruments of destruction for the protection of such places [Acc. Gray v. Coombs, *ante*, p. 867.]

6. Breaking and entering a shop in the night-season is by the law of Connecticut, burglary; and the placing of such a shop for its defence, would be justified, if the burglar is killed by them.

7. The guns would, however, constitute a nuisance, a danger to passers-by in the street; but the danger to the public is of a real and substantial nature.

8. Where, upon a prosecution for a nuisance, the jury found that the defendant placed spring-guns in his shop for its protection against burglars; that the guns were loaded and so placed as to discharge their contents obliquely into the travelled path of which was about a rod and a half from the shop that the shop was lathed and plastered on the inside and on the outside, but that it was possible that scattershot might pass through the boards at places where, by reason of the thickness of the boards, there was not a double thickness of boarding, so that the public were annoyed and apprehensive of being killed that it did not appear that there was such a danger to the public as to warrant a conviction.

Information for a nuisance by the defendant in his shop for its protection against burglars, by reason of which the public passing by upon the adjacent highway, turned the following special verdict:

"In this case, the jury find the

"The defendant owned and occupied a shop, adjoining a public highway, one and a half rods from the travelled path, which was entered by burglars, and subsequently entered it again. The defendant, for the protection of his premises, placed at the entrance of the shop, guns, loaded with powder and

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Swift Dig., 284; Johnson v. Patterson,^a 14 Conn., 1; Sarch v. Blackburn, Mood. & Malk., 505; Blackman v. Simmons, 3 Car. & Pay., 138; Brock v. Copeland, 1 Esp., 203; Hott v. Wilkes, 3 Barn. & Ald., 304; United States v. Wiltberger,^b 3 Wash., C. C., 515, 521; Gray v. Coombs,^c 7 J. J. Marsh., 478.

BUTLER, J.—It is not easy to see how the mere act of setting spring-guns on his own premises by the defendant, can be holden unlawful in itself. That such an act could not be so holden, seems to have been admitted in the leading case of Hott v. Wilkes, 3 Barn. & Ald., 304. But it may, nevertheless, be true, that he may be responsible for any injury occasioned thereby to individuals; and be indictable for the erection of a nuisance, if the public were thereby subjected to any *danger* and consequent annoyance.

What a man may not do directly, he may not do indirectly. If by the rules of the common law the defendant could not, if present, have discharged the guns which he placed in his shop, by his own direct agency, against a thief, who had broken and entered for the purpose of stealing, he certainly could not place and leave them, so that the thief, if he entered, would discharge them against himself. This principle was also admitted by the Court of King's Bench in Hott v. Wilkes, but the action was trespass, and the judges held that the rule did not apply where the trespasser had *notice* that the engine was so placed, and that the danger existed. But the fallacy of this reasoning in that respect was clearly shown in this Court by Judge SHERMAN, in Johnson v. Patterson, 14 Conn., 1; and it is settled law here, that if the wrong or guilt of the trespasser or thief is not such as to justify the injury, if inflicted directly, it cannot be justified because inflicted indirectly, and by the assisting agency of the wrong doer.

The first point made by the defendant in this case, must therefore, turn on the question, whether a man may take the life of any one who attempts to commit a

^a *Ante*, last case. ^b *Ante*, p. 34. ^c *Ante*, p. 867.

felony ; and, therefore, of a thief who attempts to break and enter a *shop* or out-house in the night season, with intent to steal. In this case, from the view we take of the nature of the offence charged against the prisoner, a determination of the question is not necessary, but as it has been raised and fully argued, and as it is of great practical interest, we will consider and settle it.

It is clear, that in the absence of any statutory provision making the offence of breaking and entering a shop in the night season *burglary*, and by the early and strict rules of the common law, a man may not take life in the prevention of such a crime. Those rules recognize a right in every man to defend his property as well as person and habitation, by taking the life of the aggressor, as a *natural right* ; but they also limit and restrain the exercise of that right, to the prevention of a certain class of forcible and atrocious crimes, of which breaking a shop in the night season is not one at common law.

The class of crimes in prevention of which a man may, if necessary, exercise his natural right to repel force by force, to the taking of the life of the aggressor, are *felonies* which are committed by *violence and surprise* ; such as murder, robbery, burglary, arson, breaking a house in the day time, *with intent to rob*, sodomy and rape. Blackstone says : " Such homicide as is committed for the prevention of any forcible and atrocious crime is justifiable by the law of nature ; and also by the law of England, as it stood as early as the time of Bracton ; " and he specifies as of that character those which we have enumerated. No others were specified by Hale or Hawkins, who wrote before him on the Pleas of the Crown, or have been specified by any writer since. Mr. East, in his Pleas of the Crown, and Mr. Foster, from whom Judge SWIFT quotes the law on this subject in his Digest, (vol. 2, page 283,) state the rule thus : " A man may repel force by force in defence of his person, habitation or property, against one who manifestly intends or endeavors, by *violence and surprise*, to commit

a known felony, such as murder, rape, robbery, arson, burglary, or the like, upon either. In these cases he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger, and if he kill him in so doing, it will be justifiable self-defence." 1 East P. C., 271; Foster C. L., 259. Neither of these writers specifies any other crimes than those enumerated, and both except from the list simple theft, and even an attempt to pick a pocket. No writer has enumerated breaking and entering a shop as one of that class of crimes. If it was technically burglary at common law, it would be included; but it is not. "To break and enter a *shop*, not parcel of the mansion house, in which the shop-keeper never lodges, but only works or trades there in the day time, is not burglary, but only larceny." 1 Hale P. C., 557, 558, cited in 1 Tomlin's Law Dict., 278. Nor have we been referred to any case in England where it has been holden that life might be taken in defence of property in a shop; nor any in this country, with the single exception of *Gray v. Coombs*,^{*} 7 J. J. Marshall, 478; and in that case, the Court did not hold that the offence was burglary, or within the class of felonies to prevent which life may be taken, by the strict letter of the common law; but rather that "the time and circumstances constituted a case of necessity, that legitimated the means resorted to." We are satisfied, therefore, that by the strict letter of the common law, a man may not take life in defence of property in a shop, and therefore, may not justify a homicide committed by placing spring-guns therein.

But these rules of the common law were originally founded on reasons, and adapted to circumstances which do not now exist; and it is a question of great importance and deserving serious consideration, whether that change of circumstances has not created a necessity for an extension of a right to take life in defence of property in a shop. The offence is a *felony*, and has all the elements of a felony by violence and surprise that burg-

^{*} *Ante*, p. 867.

lary has, except that it is presumptively committed when no person is present, and unaccompanied by danger of personal injury to the owner or his family or guests. But that, if a reason originally for the distinction between mansion house and a shop, is now to some extent, practically disregarded; for burglary may be committed in a barn, wood-house, or even smoke-house and hen-roost, though separate structures, and unconnected with the dwelling-house, and unenclosed by a common fence, if in close proximity, and "in their nature serviceable with respect to the abode;" and in such cases, no danger of personal collision exists. 1 Bish. Cr. L., §171. So, doubtless, in the olden times, all the valuables were contained in the castle (dwelling-house and curtilage) for protection, and shops were few, and did not require such protection. Now our banks, stores, warehouses, manufactories and shops contain, in large quantities, our most valuable property and goods, and those which are the most readily transported, and least easily identified and recovered. And it certainly seems very absurd to permit a man to protect his smoke-house and hen-roost, by taking the life of the nocturnal thief, and deny him the right to defend a bank, or a store full of costly jewelry or valuable silks by the same means. We are aware, that writers on the criminal law deem *certainty* of the utmost importance; and that out of various ancient common law distinctions, grow *general rules*, which give that certainty, and operate to establish practical justice; and that changes and innovation should be made by legislation, rather than judicial decision; and we admit the force of their reasoning. Still, it is a question, whether the great quantity and value of property contained in what the law terms out-houses, the ease with which it may be transported, the great extent of our country, and the means of escape by railroads, and the opportunity to dispose of stolen property and enjoy its fruits undetected in distant States and cities, and the fact that property so held is exposed, not only to the ordinary number of criminals incident to our

own population, but to great numbers who escape, or are induced to emigrate from other countries, do not constitute the offence an aggravated and exceptional one, which in the absence of legislation, should be holden to be such an atrocious felony, as to justify the use of spring-guns for its prevention. The Court so held in the case cited from the Kentucky Reports; and, an obvious leaning that way, is observable in other cases in this country.

The taking of life by spring-guns or otherwise, is confessedly lawful by the common law, and now in England, by statute, to prevent a *burglary*; and the breaking and entry in the night-season of "a shop in which goods, wares and merchandise are deposited," was by express statutory provision, made burglary, identical in character and punishment with burglary in a dwelling-house, at an early period in our history. In the edition of the statutes published in 1808, at page 297, there is a statute entitled "An act for the punishment of certain atrocious crimes and felonies," and the first clause of the statute is in these words, viz: "That whosoever shall commit burglary by breaking up any dwelling-house, or shop wherein *goods, wares or merchandise are deposited*," etc. The compiler, in a note, informs us, that the clause was originally passed in 1650, and it is therefore, among the earliest acts of the State; and in the case of the State v. Carrier, 5 Day, 131, decided in 1811, the fact that the statute had "extended the crime of burglary to the breaking and entering of a shop," was admitted by all the judges. And burglary, whether in a dwelling-house or a shop, under the ancient statute, was punishable, for the third offence, by death.

In the act referred to, as found in the edition of 1808, several offences for which the same punishment was provided, were embraced in a single section. In 1821, the revisors separated them into distinct sections, and, in so doing, placed burglary in one section, and the breaking and entry of a shop in another, adding to the latter the words, "store, warehouse and out-house, *whether parcel of any mansion-house or not*," but provided the same

punishment, viz: three years imprisonment for each. It is apparent from the words, "whether parcel of any mansion-house or not," and the similarity of the punishment, that no change in the character of the offence was intended, and such has been the understanding of the profession and the courts. In the revision of Swift's Digest by Judge Dutton, the offence is treated as burglary, (vol. 2, b. 330,) and in our forms the word "burglariously" is used in informations upon the statute. In the act of 1830, respecting crimes, the punishment of burglary was increased to a maximum of five years, and the breaking and entering a shop to four years, but that distinction in the punishment has not been regarded as changing the nature of the offence. In 1840, in the case of *Lewis v. The State*, 16 Conn., 32, it was distinctly recognized and treated as burglary.

Breaking and entering the shop in question, in the night-season, with intent to steal therefrom, would have been by our law, burglary; and, as by the settled rules of law, life may be taken to prevent a burglary, the placing of the guns in the shop was an act which the defendant could have justified, if the death of a burglar had been thereby occasioned.

We are also satisfied that if the guns had actually been dangerous to the public, who had occasion to pass the highway, they would have constituted a nuisance. The statute relative to nuisances in highways, embraces specifically objects placed or acts done within its limits. The other acts committed or omitted upon the adjoining land by the owner thereof, which endanger and annoy travellers, are nuisances at common law. An overhanging tree whose limbs actually interfere with the use of the way, or are rotten and liable to fall, is a nuisance, and the limbs may be lopped. So, it is a nuisance to suffer the highway to be incommoded, or travellers endangered by adjoining foul ditches, or to permit a dangerous and ruinous house to stand upon it, which is liable to fall into it and injure passengers; or to keep gunpowder in dangerous quantities near a public street, *carelessly*;

(*People v. Sands*, 1 Johns., 78; *Anon.*, 12 Mod., 342; *Myers v. Malcolm*, 6 Hill, 292;) or to do any other act outside of the highway which endangers the public who have occasion to pass over it, and who are entitled to the same protection from danger and annoyance while there, as when at their respective homes. Doubtless, the annoyance must be of a real and substantial nature; for "the fears of mankind, though they may be reasonable ones, will not create a nuisance." 3 Atk., 750. But placing a loaded gun so as to range over a highway, cocked, and with strings attached to the trigger, so that it may be discharged by a cat or a rat, or any other object coming in contact with the string, and sufficiently near and unprotected to inflict injury, if any one should be within its range upon the highway, creates a real and substantial danger, to which passengers on the highway should not be subjected.

We are not, however, satisfied that the facts found by the special verdict, will authorize a judgment against the prisoner. It is found that scattering shot might pass between the cracks of one thickness of the boarding, and through the other to the outside. But it is not found that they would pass through with sufficient force to inflict injury, or even to cross the intervening space between the shop and the highway. It is not, therefore, sufficiently found that the apprehended danger to the public was real and substantial, and judgment must be rendered for the defendant.

In this opinion, the other judges concurred.

Judgment for defendant.

NOTE.—1. That a person is not obliged to surrender the possession of his goods, his lands, or other property to a wrong-doer, without resistance, does not admit of question. *People v. Hubbard*, 24 Wend., 369; *Curtis v. Hubbard*, 1 Hill, 336; *S. C.*, 4 Hill, 437; *Commonwealth v. Kennard*, 8 Pick., 133, 137; *Commonwealth v. Power*, 7 Metcalf, (Mass.), 596; *People v. Honshell*, 10 Cal., 87; *Harrington v. People*, 5 Barb., 611, 612; *McAuley v. State*, 3 G. Greene, 435; 1 Bish. Crim. Law, § 861, 5th ed. He may, by the doctrine of these and all the cases where the rule is stated, use, within a certain prescribed limit, as much force as is necessary to preserve his possession—taking care that the degree of force used does not exceed what

is necessary, or what reasonably appears to be necessary, for the purposes of defence and prevention.

2. The limit above spoken of, is the limit at which it becomes necessary to *take life*, in order to protect one's possession. And here, the criminal law, which seeks certainty in its rules, as far as possible, divides offences against property into two general classes, namely, felonies and trespasses, for the purpose of determining whether a killing in prevention of such offences, shall be deemed justifiable or culpable.

a. And the first rule which may be stated is, that a killing which is necessary, or which appears to be reasonably necessary, to prevent a forcible and atrocious felony against property, is justifiable homicide. The preceding cases of this PART are referred to as authority for this statement of doctrine. See also *Mc Pherson v. State*, 22 Ga., 478.

This rule, the common law writers do not extend to *secret* felonies, or felonies not accompanied with *force*. 1 Hale P. C., 488; 1 East P. C., 273; Foster, 274. Though we do not find this principle adjudged in any modern case which we have seen, yet it has been quoted with approbation in several. Pond's case, *ante*, pp. 820, 821; Moore's case, *supra*. Mr. Bishop, however, is of opinion that upon principle there can be found no such distinction in the law itself; but why he is of this opinion, he does not satisfactorily tell us. 1 Bish. Crim. Law, § 853, 5th ed. It is pretty clear, that the right to kill in defence of property does not extend to cases of *larceny*, which is a crime of a secret character; although the cases which illustrate this exception, are generally cases of theft of articles of small value. Thus, in *Reg. v. Murphy*, 2 Crawf. & Dix C. C., 20, the prisoner was indicted under the statute for maliciously shooting with intent to do grievous bodily harm, etc. It appeared that on the day in question, the prisoner, who was a game-keeper and wood-ranger of Lord Dunsany, and armed with a fowling piece, detected the prosecutor in the act of carrying away from his employer's lands a bundle of sticks, consisting of branches severed from growing timber by a recent storm; that the prisoner hailed him, when he dropped the sticks and ran, upon which the prisoner called out, "If you don't stop, I'll fire;" but the prosecutor still going on, the prisoner fired, wounding him in the head, back and arms. DOHERTY, Ch. J.: "There is no doubt that the prosecutor, in carrying away the branches previously dissevered from the trees, was committing a felony, and the prisoner was clearly entitled to arrest him; but in discharging his gun at the prosecutor, and periling his life, the prisoner has very much exceeded his lawful powers, and I cannot allow it to go abroad, that it is lawful to fire upon a person committing trespass and larceny; for that would be punishing, perhaps with death, offences for which the law has provided milder penalties." * * * Verdict, guilty. And see to the same effect, *McClelland v. Kay*, 14 B. Monroe. 106; *Gardiner v. Thibodeau*, 14 La. An., 783; *State v. Vance*, 17 Iowa, 144; *Priester v. Augley*, 5 Rich., (Law), 44. It may be observed, however, that the right extends to statutory felonies, as well as felonies at common law. *Gray v. Coombs*, *ante*, p. 867; Pond's case, *ante*, p. 824; Moore's case, *supra*. And it would seem that the fact that a common law felony has been reduced by statute to a misdemeanor, does not diminish the right of defence applicable to such cases. *Gray v. Coombs*, *supra*; *Drennan v. People*, 10 Mich., 169.

And it is evident from the preceding cases, that there are many nice and curious questions growing out of this right to take life in the necessary prevention of felonies against property, to be settled by future adjudications, or by future legislative action. Thus, if I discover a man riding away with my horse, as a thief, it would seem that I may not lawfully kill him to prevent the commission of the theft; for larceny is a secret and not a forcible felony. Perhaps in Tennessee, where horse-stealing is a capital felony, there would not be much question as to the right to kill the thief in order to recapture the horse; and perhaps it would be difficult to find a jury any where, that would convict the slayer of felonious homicide in such a case. On the other hand, if a man endeavor to take my horse by force, as a robber, there is no question that I may lawfully kill him, if necessary to prevent the consummation of the crime, and protect my possession. But if a man endeavor, maliciously, to kill my horse, this offence being a statutory misdemeanor only, denominated malicious mischief, I would not, technically speaking, be permitted to kill him to prevent the mischief; but in the eye of reason and justice I clearly would be; for the attack is of a forcible and violent character, and involves the loss of my beast more completely than if carried off by a robber; for, in the latter case, I might recapture it, while, in the former case, I could not bring it to life. Again: property of trifling value, intrinsically, may, from some peculiar circumstances, become of such value to the owner, as to justify taking life in its preservation. Thus, to borrow a far-fetched illustration, if a man sees a thief running away with his water-skin in a desert, he might be justified in killing him to prevent the theft; for the contents, though in themselves of no value, might, under the circumstances in which he is placed, be of equal value with his life—the only means of sustaining him to his journey's end. And, doubtless, extreme cases of this kind may arise in civilized communities.

b. But the ordinary rule is, that a killing to prevent a mere trespass upon property, or any asportation of or injury to it, which does not amount to a felony, is a felonious homicide; or, viewed in the light of a civil action, unlawful. Harrison's case, *ante*, p. 71; Drew's case, *ante*, p. 705; United States v. Williams, 2 Cranch, C. C., 439; Priester v. Augley, 5 Rich. (Law), 44; State v. Morgan, 3 Ired., 186; State v. McDonald, 4 Jones (Law), 22; State v. Brandon, 8 Jones (Law), 467; State v. Vance, 17 Iowa, 144; Gardiner v. Thibodeau, 14 La. An., 733; McClelland v. Kay, 14 B. Monroe, 106. As where a person kills an officer who comes unlawfully to distrain his goods. United States v. Williams, *supra*. Or where a person kills a slave who is stealing sugar-cane. Priester v. Augley, *supra*. Or stealing chickens. McClelland v. Kay, *supra*; Gardiner v. Thibodeau, *supra*. Or where a person kills another who lets down a dividing fence, and hauls off manure as to which there is a disputed claim. State v. McDonald, *supra*. Or kills one who is taking corn from a bin, the right to which is in dispute. State v. Brandon, *supra*. Or where a person fires among a party of boys who are stealing his melons, and kills one of them. State v. Vance, *supra*. Or shoots and wounds a person who is carrying off branches severed from his master's trees. Reg. v. Murphy, *supra*.

c. The next distinction is, that a bare trespass upon property, not the

habitation, unaccompanied with force against the owner, is not such a *provocation* as will reduce a deliberate killing of the trespasser from murder to manslaughter. Harrison's case, *ante*, p. 71; Drew's case, *ante*, p. 705; State v. Brandon, 8 Jones (Law), 467; State v. McDonald, 4 Jones (Law), 22; State v. Morgan, 3 Ired (Law), 186; State v. Vance, 17 Iowa, 144. From this also results a correlative proposition that a man may not lawfully use a deadly weapon in defence of his property, not his dwelling-house, against a bare trespasser. Drew's case, *supra*; State v. Vance, *supra*; Harrison's case, *supra*; Reg. v. Murphy, *supra*; State v. Morgan, 3 Ired, 186.

But while this is true, such a killing is not necessarily murder. It may be either murder or manslaughter. United States v. Williams, 2 Cranch C. C., 438. The trespass may be mixed with other ingredients involving an attack upon the owner, or an unlawful resistance to the reasonable force he may have used in defence; or the force used by the owner, whilst excessive, may not have been characterized by wanton cruelty or intentional of death—in which case the killing might well be adjudged manslaughter, and not murder. Again, the killing may have been *accidental*, while the owner was employing no more than a lawful degree of force and without negligence; in which case it would be *excusable homicide by misadventure*. Hinchliff's case, 1 Lewin C. C., 161. And see, for an extended discussion upon this question, State v. Vance, 17 Iowa, 144–149.

3. As stated in the principal case, the rule in *Hott v. Wilkes*, 3 Barn. & Ald., 304, turned upon the fact that the plaintiff had *notice* that spring-guns were set in the wood, and hence, the plaintiff, having gone into the wood voluntarily, and discharged one of them, whereby he was injured, the injury was the result of his own act. So, in *Deane v. Clayton*, 7 Taunt., 518, there was notice that dog-spears, etc., were placed in the wood. In both of these cases the judges agreed that it would not be allowable, without notice, to expose even a trespasser to mortal injury. And agreeably to this view, in a subsequent case—*Bird v. Holbrook*, 9 East, 628—where the defendant for the protection of his property, some of which had been stolen, set a spring-gun, *without notice*, in a walled garden, at a distance from his house; by which the plaintiff, who had climbed over the wall in pursuit of a stray fowl, was shot, it was held that the defendant was liable in damages, on the ground that there had been no notice; but the correctness of this ruling is doubted in *Jordin v. Crump*, 8 Mees. & Wells., 789. So, in *Jay v. Whitefield*, an unreported case, cited in 3 Barn. & Ald., 308, and in 4 Bing., 644, the plaintiff, a boy, having entered the defendant's premises for the purpose of cutting a stick, was shot by a spring-gun, for which injury he recovered £120 damages; but it does not appear whether or not notice had been given in this case.

In *Wootton v. Dawkins*, 2 Com. Bench, N. S., 412, the plaintiff entered the defendant's garden at night, and without his permission, to search for a stray fowl, and, whilst looking closely into some bushes, he came in contact with a wire, which caused *something* to explode with a loud noise, knocking him down and slightly injuring his face and eyes. It was held—(1.) That the defendant was not liable for this injury at common law; (2.) That, in the absence of evidence that it was caused by a spring-gun or

other engine calculated to inflict grievous bodily harm, he was not liable under the 7 and 8 Geo. 4, ch. 18, § 1.

In *Jordin v. Crump*, 8 Mees. and Wells., 782, the rule is laid down that a person, passing with his dog through a wood, in which he knows dog-spears are set, has no right of action against the owner of the wood, for the death or injury to his dog, who, by reason of his own natural instinct, and against the will of his master, runs off the path against one of the dog-spears, and is killed or injured; because the setting of dog-spears was not in itself an illegal act, nor was it rendered so by the 7 and 8 Geo. 4, ch. 18.

In a case earlier than any of the above, it was held that if a man place dangerous traps, baited with flesh, in his own ground, so near to a highway, or to the premises of another, that dogs passing along the highway, or kept in his neighbor's premises, must probably be attracted by their instinct into the traps; and, in consequence of such act, his neighbor's dogs are so attracted, and thereby injured, he is liable in damages. *Townsend v. Wathen*, 9 East, 277. But in this case it was proven to have been his intention to kill dogs by this means, as well as other animals; several dogs having been killed in such traps, and he having allowed his game-keeper a reward of one shilling for every dog so killed.

In a still earlier case, where the action was brought to recover damages for an injury received from the defendant's dog, it was proved that the defendant was a carpenter, and that the dog was kept for the defence of his yard; that he was kept tied up all day, and was at that time very quiet and gentle, but was let loose at night. It was further proved that the plaintiff, who was foreman to the defendant, had gone into the yard after it had been shut up for the night, and the dog let out; at which time the injury happened, the dog having then bit and torn him.

On the evidence, Lord KENYON ruled that the action would not lie. He said that every man had a right to keep a dog for the protection of his yard or house; that the injury which this action [case] was calculated to redress, was where an animal known to be mischievous was permitted to go at large, and the injury therefore arose from the fault of the owner in not securing such animal, so as not to endanger or injure the public; that here the dog had been properly let loose; and the injury had arisen from the plaintiff's own fault, in incautiously going into the defendant's yard after it had been shut up. *Brock v. Copeland*, 1 Esp., 202.

The present English statute on the subject of spring-guns, man-traps, etc., appears to be the 24 and 25 Vlt., ch. 100, § 31, by which it is enacted, in substance, that whosoever shall set or place, or cause to be set or placed, any spring-gun, man-trap, or other engine calculated to destroy human life or inflict grievous bodily harm, with the intent that the same, or whereby the same may destroy or inflict grievous bodily harm upon a trespasser or other person coming in contact therewith, shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the Court, to be kept in penal servitude for the term of five years, [27 and 28 Vlt., ch. 47,] or to be imprisoned for any term not exceeding two years, without hard labor. And by the subsequent provisions, whosoever shall knowingly and wilfully permit such traps to be set, is deemed to have set them himself; provided this act shall not apply to traps set to destroy vermin, nor to engines set at night for the protection of dwelling-houses.

PART IV.

OF THE BURDEN AND QUANTUM OF
PROOF UNDER THE PLEA OF
SELF-DEFENCE.*

TWEEDY v. THE STATE.

[5 IOWA, 433.]

Supreme Court of Iowa, June Term, 1857.

GEORGE W. WRIGHT, *Chief Justice.*
WM. G. WOODWARD, } *Justices.*
L. D. STOCKTON, }

HOMICIDE IN SELF-DEFENCE—BURDEN AND QUANTUM OF PROOF.

1. In criminal cases the rule is, that the person charged is presumed to be innocent, until he is proven guilty.

2. If, upon a consideration of all the evidence, there be a reasonable doubt of the guilt of the party, the jury are to give him the benefit of such doubt.

3. Neither a preponderance of evidence, nor any weight of preponderant evidence, is sufficient in a criminal case, unless it generates a full belief of the guilt of the party charged, to the exclusion of all reasonable doubt. [Acc. Stokes' case, *post*; The State v. Patterson, 12 Am. Law Reg., N. S., 602.]

4. When the evidence in a criminal case relates solely to the original transaction, and forms a part of the *res gestæ*, the defendant has a right to claim that the proof made does not manifest his guilt, because it is left in doubt, whether the act was committed under unjustifiable circumstances.

5. Hence, where the matter of excuse or justification of the offence charged, grows out of the original transaction, the defendant is not driven

* Of course there is no formal "plea of self-defence." This defence is raised under the general plea of not guilty. But the expression is frequently used to avoid a circumlocution.

to the necessity of establishing the matter in excuse or justification, by a preponderance of evidence, and much less beyond a reasonable doubt.

6. On the trial of an indictment for murder, proof of the killing will not change the burden of proof, where the excuse or justification is apparent on the evidence offered by the prosecution, or arises out of the circumstances attending the homicide.

7. A party is not compelled to flee from his adversary, who assails him with a deadly weapon, and go to the wall, (as it is termed,) before he can justify a homicide. [See note, p. 28; note, p. 139.]

8. Where on the trial of an indictment for murder, the Court instructed the jury as follows: "1. The facts of excuse or self-defence, must be proven to the minds of the jury, clearly, and beyond a reasonable doubt; otherwise, they must find the defendant guilty of murder or manslaughter. 2. If the jury find that the defendant did kill the deceased, they must be convinced, beyond a reasonable doubt, of the facts offered in justification of the killing; and unless other justifying facts have been proven, they must be satisfied, beyond a reasonable doubt, that the deceased did attack the defendant with a deadly weapon, and drive him to the wall, before the defendant can justify." *Held*, That the instructions were erroneous. [Acc. next case.]

Indictment for murder in the second degree. The defendant was found guilty of manslaughter, sentenced to the penitentiary for five years, and from this judgment sues out this writ of error. All the facts material to an understanding of the questions decided, will be found in the opinion of the Court.

J. C. Hall and Miller, Rankin & Euster, for the appellant; *C. Ben Darwin*, and *S. A. Rice*, Attorney-General, for The State.

WRIGHT, Ch. J., delivered the opinion of the Court:

During the progress of the trial in the Court below, various exceptions were taken to the rulings and decisions there made, which are now assigned for error. Without intimating an opinion upon many of them, we shall briefly refer to a few of those brought to our attention. It seems that there was testimony tending to show, that the defendant had acted in self-defence. Upon this subject, the Court instructed the jury as follows:

First. "The facts of excuse, or self-defence, must be proven to the minds of the jury, clearly and beyond a

reasonable doubt, otherwise they must find the defendant guilty of murder or manslaughter."

Second. "If the jury find that the defendant did kill the deceased, they must be convinced, beyond a reasonable doubt, of the truth of the facts offered in justification of the killing; and unless other justifying facts have been proven, they must be satisfied, beyond a reasonable doubt, that the deceased did attack the defendant with a deadly weapon, and drive him to the wall, before defendant can justify."

Several other instructions, embodying substantially the same principles, were given, and others, as asked by defendant upon the same subject, were refused. Without giving them, however, we shall consider those above set out, our views thereon sufficiently indicating the opinion entertained upon the general subject. We think these instructions were clearly erroneous.

In criminal cases, the rule is, that the person charged, is presumed to be innocent until his guilt is proved. If, upon a consideration of all the evidence, there be a reasonable doubt of his guilt, the jury are to give him the benefit of such doubt. What is meant, or what will amount to such reasonable doubt, we need not at present consider.

If however, the prisoner shall concede the fact of the killing, or if it be found that he is the author of the homicide, and he relies upon matter in excuse or justification of the act, the enquiry arises, whether he must prove such matter beyond a reasonable doubt. Whatever the rule may be, where he relies on some distinct substantive ground of defence, not necessarily connected with the transaction upon which the indictment is founded, (such as insanity), we know of no case that has gone so far as to hold, that where the defence is confined to the circumstances accompanying the original transaction, (as that he acted in self-defence), that he must prove such justification beyond a reasonable doubt.

In criminal cases, the jury, in finding a verdict, do not weigh the evidence, in the sense that they are required

to, and do, weigh it in civil cases. In the one class of cases, they are to weigh it carefully, and decide according to its preponderance, although it may not be free from reasonable doubt. In criminal cases, however, neither a preponderance of evidence, nor any weight of preponderant evidence, is sufficient for the purpose, unless it generate a full belief of the fact, to the exclusion of all reasonable doubt. 3 Greenleaf Ev., §29; Whart. American Cr. Law, 327. Now, applying this rule to the defence contemplated by this instruction, taking for the present the strongest view of it against the prisoner, and how does it stand? He is presumed to be innocent. "This presumption," says the prosecution, "is rebutted and removed, when it is found, or conclusively established, that he was the author of the homicide." Grant this, and that he does then stand in the attitude of guilt. Then, it seems to us, that if the circumstances, whether proved by him or the State, preponderate even in favor of the matter in excuse or justification, there instantly arises a reasonable doubt of his guilt, and an acquittal should follow.

Whereas, if he is required to establish such defence, beyond a reasonable doubt, then most manifestly, they should entertain a reasonable doubt of his guilt. And this process of reasoning, is quite as favorable certainly, as the State could ask; and yet, by this, it must be obvious, that the instructions were erroneous.

But we need not stop here; for the prisoner, in such cases, is entitled to even a more favorable rule. The defence of the defendant, related to and grew out of the transaction, or *res gestæ*, which constituted the supposed criminal act. To establish it, he was not required to, and need not, assume to prove anything aside or out of the case, on the part of the Government. He had a right to claim and insist, that taking the facts and circumstances all together, as proved on both sides, he was not shown to be guilty; and if the facts constituting the transaction, on which the prosecution rested, did not prove beyond a reasonable doubt, that he committed the

offence with which he was charged, (or one necessarily included in it), he was entitled to an acquittal. To constitute the crime of murder, the prisoner must have killed the person named in the indictment, with malice aforethought, either express or implied. If the killing was justifiable, then there was no malice aforethought; it was not murder—nor was it manslaughter.

Now, if the evidence fails to show that the act was unjustifiable, or, if that question is left in doubt, how can it be said, that the criminal act is proved, or that the jury should not acquit. The defendant has a right to claim, when the evidence relates solely to the original transaction, and forms part of the *res gestæ*, that the proof, so made, does not make manifest his guilt, because it is left in doubt whether the act was committed under unjustifiable circumstances. And thus we see, that he is not driven to the necessity of establishing the matter in excuse or justification, by a preponderance of evidence, much less beyond a reasonable doubt; and that proof of the killing, will not change the burden, when the excuse or justification, is apparent on the evidence offered by the prosecutor, or arises out of the circumstances attending the homicide. *Commonwealth v. McKee*, 1 Gray, 61; *Com. v. York*, 9 Metcalf, 116; *Com. v. Webster*, 5 Cush., 305. If, upon a consideration of all these circumstances, the jury entertain a reasonable doubt of any fact essential to establish the guilt, this doubt should be solved in favor of the prisoner, and they should acquit. The foregoing remarks apply to the first, and a portion of the second instruction. But the jury were also told, that “unless other justifying facts have been proven, they must be satisfied, beyond a reasonable doubt, that the deceased did attack the defendant with a deadly weapon and drive him to the wall, before the defendant can justify.” Upon what principle this instruction can be sustained, it is impossible for us to understand. However the rule may have been at one time, it is certainly now well settled, that the prisoner is not compelled to flee from his adversary, who assails

him with a deadly weapon, and go to the wall, (as it is termed), before he can justify the homicide. And much more clearly is it true, that the prisoner need not satisfy the jury, beyond a reasonable doubt, that he did go to the wall, before he can justify. If this was the rule, it would be next to impossible for any man to successfully urge such a defence. Though the danger might be ever so actual, and imminent—though his efforts to escape a conflict might be all that his personal safety could reasonably dictate—still, if the jury entertained a reasonable doubt, whether he had retreated as far as he could, they would be bound to convict. Such a rule is contrary to every correct idea of the rights of self-defence, and finds no support either from authority or reason. Without further enlarging upon propositions that are, to our minds, so clear, we conclude that the judgment must be reversed, and a trial *de novo* awarded.

Judgment reversed.

THE PEOPLE v. SCHRYVER.

[42 N.Y., 1.]

Court of Appeals of New York, March Term, 1870.

ROBERT EARL, <i>Chief Justice.</i>	} <i>Judges of the Court of Appeals.</i>
MARTIN GROVER,	
WARD HUNT,	
JOHN A. LOTT,	

1. In trials for homicide, it is incumbent upon the people to establish all the facts alleged in the indictment, beyond a reasonable doubt; but if the defendant seek to justify the homicide on the ground of self-defence, the burden is upon him, to make out such defence; and it is not sufficient in so doing, that he raise a reasonable doubt in his own favor, nor is it required that he establish such defence beyond a reasonable doubt; but he must make such defence appear to the jury by the same preponderance of evidence that is required in civil cases.

2. But if, in such cases, the facts which give him the right to insist upon such a defence are brought out by the prosecution, it is error to instruct the jury that it is incumbent upon the prisoner to make such defence good, by proof, or to tell them that, he having offered no proof tending to make out such a defence, the question is not before them. [Acc. Tweedy's case, *ante*, last case.]

3. *Patterson v. The People*, 46 Barb., 625, overruled; *People v. McCann*, 16 N. Y., 58, commented on and followed, but the opinion of BROWN, J., doubted.

Error to the General Term of the Supreme Court in the third judicial district, to review the judgment of that court reversing the conviction of defendant in error, at the Ulster sessions, for manslaughter in the third degree.

Abraham Schryver, the defendant in error, was indicted for manslaughter in the third degree, for killing John Kavanagh, at Kingston, Ulster county, on the 17th day of November, 1868. The indictment was brought to trial at the Ulster sessions, in June, 1869, and the defendant was convicted and sentenced to imprisonment for the term of three years. The judgment of conviction was taken, by writ of error, to the Supreme Court, and at the General Term, held in the third district, in September, 1869, was reversed, and a new trial was granted. The case was then brought into this Court by writ of error on the part of the People.

On the trial it appeared that the defendant and Kavanagh met, having had little previous acquaintance. After a few angry words, Kavanagh knocked defendant down two or three times with his fist, upon slight, if any, provocation. There was evidence tending to show that after Kavanagh knocked the defendant down, he got upon him, and struck him while he was down, and threatened to take his life. After he was knocked down, and either while he was down, or while he was standing, (the evidence leaving that point somewhat in doubt), the defendant stabbed Kavanagh with a knife, inflicting a wound of which he died the next day. The evidence tended to show that when the defendant used the knife,

he had reason to believe, and did believe, that Kavanagh intended to kill him, or do him great personal injury.

There was no dispute upon the trial, that the defendant killed Kavanagh in the manner alleged. But the dispute upon the evidence, was whether the killing was necessary in self-defence, and whether the defendant really believed it to be necessary.

The Court charged the jury, among other things, as follows: "In all criminal cases there are two fundamental rules to be borne in mind by the jury; the one is that the prisoner is to be presumed innocent until proved guilty; the other is that the prisoner is entitled to the benefit of any reasonable doubt. But in this case, this last rule is only to be applied by you, subject to the conditions and modifications that I shall lay down to you. The killing, in this case, has been proved, and is conceded, and there is no doubt as to the identity of the prisoner.

"With these conceded facts, the prisoner asserts that the killing was in self-defence, and was justified by the law. It is for him to make this allegation good by proof. If the defendant has given no proof tending to show that the act was committed in self-defence, the necessary defence of his person, there is no question before you on this point. If he has given evidence, or if any of the evidence in the case tends to show such a defence, then the question before you is, whether such evidence is satisfactory and sufficient."

To each and every portion of said charge, the defendant then and there duly excepted.

The Court further charged the jury: "It is for the prisoner to satisfy the jury beyond a reasonable doubt, that he did apprehend, and had reason to apprehend, that he was in imminent danger of his life, or of the infliction of some great personal injury.

"If the evidence falls short of this, and only raises a doubt whether or not the prisoner stood in fear of his life or his person, that is not sufficient to acquit the

prisoner. The evidence must go one step further, and satisfy this jury, beyond reasonable doubt, on this point."

To each and every of which propositions, the defendant then and there duly excepted.

Frederick L. Westbrook, District-Attorney, for the plaintiff in error, insisted that the killing with a dangerous weapon being proved and conceded, the burden of proof of justification was upon defendant, and the defence of justification must be proved *beyond a reasonable doubt*, citing: Cases cited in Wharton's Cr. Law, 614; *The King v. Oneby*, 2 Ld. Raym., 1485; 1 Alison's Cr. Law, 49; *Com. v. York*, 9 Met., 115; *Darry v. People*, 2 Park, 638; *People v. McLeod*,^a 1 Hill, 436; *T. O. Selfridge's case*,^b Wharton's Law of Homicide, 457; *Rex v. Thomas*, 7 Car. & Pay., 817; *Com. v. Poke*, Lewis' C. L., 394-7; Wharton's Law of Homicide, 189-191; *Burr. on Cir. Ev.*, 446; *Roscoe's Cr. Ev.*, 18; *Tweedy v. State*,^c 5 Iowa, 534; *State v. Knight*, 43 Maine, 11; *Com. v. Knapp*, 10 Pick., 484; *Com. v. Webster*, 5 Cush., 324; *Fife v. Com.*, 29 Penn., 429; *People v. Cotteral*, 18 John., 120; Lord MANSFIELD's charge in *Bellingham's case*, 1 Collinson on Lunacy, 671, and 1 Russ. on Cr., 11; *McNaughten's case*, 47 Eng. C. L. R., 131; *Com. v. Rogers*, 7 Met., 500; *State v. Spencer*, 1 Zabriskie, 196; *East's Crown Law*, 279; *Foster's Crown Law*, 290; 4 Bla. Com., 201; 2 Starkie on Ev., 489; 1 Russ. on Cr., 614-616; *Reg. v. Smith*,^d 8 Car. & Pay., 160; *People v. Stonecifer*, 6 Cal., 405; *State v. Neely*,^e 20 Iowa, 108; *People v. Arnold*,^f 15 Cal., 476; *Bacon, J.*, in *Patterson v. People*, 46 Barb., 625.

As to the term "beyond a reasonable doubt," he cited *Will's Cir. Ev.*, 7; *Burr. on Cir. Ev.*, 200; 2 Colby [?] Cr. L., 189; *People v. McCann*, 16 N. Y., 69, in view of the language of the charge in *Com. v. Rogers*, 7 Met., 505; *State v. Spencer* and *Patterson v. People*, *supra*.

Wm. Lounsbury, for the defendant in error.

^a *Ante*, p. 784. ^b *Ante*, p. 1. ^c *Ante*, last case. ^d *Ante*, p. 130. ^e *Ante*, p. 106. ^f *Ante*, p. 600.

EARL, Ch. J., delivered the opinion of the Court:

On the trial, the people endeavored to show that the killing was manslaughter in the third degree; and the prisoner that the killing was in self-defence, and thus justifiable homicide. The Court charged the jury that the prisoner was bound to prove his defence of justifiable homicide "beyond a reasonable doubt." In this I think the Court erred.

The statute defining manslaughter in the third degree, is as follows: "The killing of another in the heat of passion, without a design to effect death, by a dangerous weapon in any case, except wherein the killing of another is herein declared to be justifiable or excusable, shall be deemed manslaughter in the third degree." 3 R. S., 5th ed., 940, § 12.

Homicide by any person is declared by the statute, *Ib.*, p. 939, § 3, to be justifiable in the following cases:

1. When resisting any attempt to murder such person, or to commit any felony upon him, etc; or

2. When committed in the lawful defence of such person, etc., when there shall be a reasonable ground to apprehend a design to commit a felony, or to do some great personal injury, and there shall be imminent danger of such design being accomplished."

Then it is provided by section 5, on page 940, that "whenever it shall appear to the jury on the trial of any person indicted for murder or manslaughter, that the alleged homicide was committed under circumstances or in cases, where, by law, such homicide was justifiable or excusable, the jury shall render a general verdict of not guilty."

Now, what is the rule of evidence as to the burden of proof, not in a case where the prisoner is attempting to show that the homicide is manslaughter instead of murder, but in a case where he is attempting to show that an admitted homicide was justifiable under the statute? In civil cases, where the mischief of an erroneous conclusion is not deemed remediless, it is not necessary that

the minds of the jurors be freed from all doubt; it is their duty to decide in favor of the party on whose side the weight of evidence preponderates, and according to the reasonable probability of truth. But in criminal cases, because of the more serious and irreparable nature of the consequences of a wrong decision, the jurors are required to be satisfied beyond any reasonable doubt of the guilt of the accused, or it is their duty to acquit him, the charge not being proved by that higher degree of evidence which the law demands. In civil cases, it is sufficient if the evidence on the whole agrees with and supports the hypothesis which it is adduced to prove; but in criminal cases it must exclude every other hypothesis but that of the guilt of the party. 1 Greenleaf's Ev., § 13 a; 3 Ib., § 29; People v. McCann, 16 N. Y., 58. Reasonable doubt is defined by Chief Justice SHAW, in Com. v. Webster, 5 Cush., 320, to be "that state of the case which, after the entire comparison and consideration of all the evidence, leaves the mind of the jurors in that condition, that they cannot say they feel an abiding conviction, to a moral certainty of the truth of the charge." This degree of certainty is never required in civil cases, but is required in criminal cases by reason of the humane regard which the law has for the life and liberty of the persons put upon trial for crimes.

It is a rule, applicable to criminal as well as to civil trials, that the party having the affirmative of any proposition, has the burden of proof, and the people must, in all cases, sustain this burden beyond a reasonable doubt. But this does not mean that they must thus establish every fact involved in the trial. They must thus establish all the material allegations contained in the indictment. They must thus prove the crime, the *corpus delicti*. In all cases of voluntary, intentional homicide, it is sufficient for the people to prove, beyond a reasonable doubt, that the prisoner killed the person, whose life is alleged to have been taken, and then the burden is upon the prisoner to show that it was justifiable or excusable, if he claims that it was either. In

Foster's Crown Law, 255, it is said: "In every charge of murder, *the fact of killing being first proved*, all the circumstances of accident, necessity or infirmity are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him, for the law presumeth the fact to have been founded in malice, until the contrary appeareth, and very right it is that the law should so presume. The defendant, in this instance, standeth upon just the same ground that every other defendant doth; the matters tending to justify, excuse or alleviate, must appear in evidence *before he can avail himself of them*." In Legg's case, Kel. 27, John Legg was indicted for the murder of Robert Wise; and "it was upon the evidence agreed, that if one kill another and no sudden quarrel appeareth, this is murder, and it lieth on the party indicted to prove the sudden quarrel." This was approved in the leading case of the King v. Oneby (2 Ld. Raym., 1485), in which one objection to the verdict was, that the homicide was upon a sudden quarrel, and so but manslaughter, whereupon the Court stated the rule, thus: "In answer to this objection, I must first take notice that when a man is killed, the law will not presume that it was upon a sudden quarrel unless it is proved to be; and, therefore, in Legg's case it was agreed upon evidence, that if A. kills B., and no sudden quarrel appears, it is murder; for it lies on the party indicted to prove the sudden quarrel." In Hawkins, ch. 31, § 32, it is laid down that whenever it appears that a man killed another, it shall be intended *prima facie* that he did it maliciously, unless he can make out the contrary, by showing that he did it on a sudden provocation, etc.

In 4 Bla. Com., 201, it is said: "We may take it for a general rule, that all homicide is malicious, and, of course, amounts to murder, unless when justified, excused or alleviated into manslaughter; and all these circumstances of justification, excuse or alleviation, it is incumbent upon the prisoner to make out to the satisfaction of the Court and jury." In Best's Right to Begin

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and Reply, page 19, it is said: "Although the law never presumes guilt or fraud in the first instance, yet it is held that where a homicide has once been proven, the law will presume that it was done maliciously, and cast on the party accused, the onus of proving either his complete justification or excuse, or such palliating circumstances as may reduce the offence to manslaughter." To the same effect, see 1 Alison, Cr. Law, 49; 1 Russell on Crimes, 1st Ed., 614-616; 1 Greenleaf, §34; 1 Wharton's Cr. Law, §§ 614, 708, 709; Wharton's Law of Homicide, 458; People v. Stonecifer, 6 Cal., 405; People v. Cotteral, 18 John., 115; People v. McLeod, 1 Hill, 377, 436; Com. v. York, 9 Metcalf, 93.

In York's case, Chief Justice SHAW has discussed the question with a great wealth of learning and thoroughness of research, and he says: "Suppose a party indicted for manslaughter, and that the defence should be excusable self-defence. Suppose the fact of killing should be clearly proved, but an attempt to prove a previous violent attack upon him by the deceased should fail, although the evidence might tend to raise some doubt whether there was not such previous attack. The conviction in such case must rest on proof establishing the *corpus delicti* beyond reasonable doubt, although the whole evidence would raise a doubt, whether there had not been such previous attack. The proof establishing the necessity for such taking of life in self-defence, must be satisfactorily made out. Raising a doubt would be insufficient."

In the case of The People v. McCann, 16 N. Y., 58, the presiding justice at the trial charged the jury, that the prisoner was bound to prove his defence of insanity "beyond a reasonable doubt." Whether this charge was correct or not, was the only question for the consideration of the Court of Appeals, and it was held to be incorrect, and the judgment was reversed. Two opinions were written; Judge BOWEN held that it was enough for the prisoner to establish this defence, as insanity would be proved in a civil case, by a preponderance of evidence.

Judge BROWN held, that while the law presumed every man to be sane, when the prisoner introduced evidence tending to show his insanity, the burden devolved upon the People to prove his sanity, like any other material fact in the case, beyond a reasonable doubt. It does not appear that the Court concurred in this view. It was sufficient for the Court to hold that the charge was too unfavorable to the prisoner. Before Judge BROWN's opinion shall be taken as the settled law, the question will need further consideration, as it does not seem to be supported by the current of authorities.

The judge presiding at the trial of this case, is said to have followed in his charge, the case of *Patterson v. The People*, 46 Barb., 625, in which, in a case of homicide, it was held in substance, that the prisoner was bound to prove his justification beyond a reasonable doubt. No authority is cited to uphold this rule, and it is clearly against every authority that can be found in the books.

The rule that the *corpus delicti* must be proved beyond a reasonable doubt, was intended as a shield to prisoners, and must never be used as a sword. In the language of Lord Hale, *tutius semper est errare in acquittando, quam in puniendo, ex parte misericordiae, quam ex parte justitiæ*.

The People, in every case of homicide, must prove the *corpus delicti* beyond a reasonable doubt, and if the prisoner claims a justification, he must take upon himself the burden of satisfying the jury by a preponderance of evidence. He must produce the same degree of proof that would be required if the blow inflicted had not produced death, and he had been sued for assault and battery, and had set up a justification. When a man takes human life, upon which the law sets a high value, it is not sufficient for him to raise a reasonable doubt, whether he was justifiable or not, but he must go one step further, and give satisfactory evidence that he was justified. This rule is sufficiently humane to the prisoner, and at the same time gives some protection to human life.

If the conclusion which I have thus reached were not sufficiently clear upon reason and authority, I might rest it upon the wording of the statute as above cited. The statute, after defining murder, manslaughter, and justifiable and excusable homicide, provides in section five, that whenever "it shall appear to the jury" that the homicide was justifiable or excusable, the jury shall render a verdict of not guilty. Here is the rule just as I claim it to be. The prisoner must make it *appear to the jury* that he was justified. It is not sufficient for him to raise a reasonable doubt, neither is it necessary for him to establish his justification beyond a reasonable doubt. He must make his defence appear to the jury; availing himself of all the evidence in the case given on either side. Nothing more and nothing less is required.

The judgment should therefore be affirmed.

SUTHERLAND, J., said: The case made by the testimony of the witnesses on the part of the People in this case, was the case of an affray between the deceased and the prisoner, commenced by a most unjustifiable and violent assault of the deceased upon the prisoner, in or during which affray, the prisoner stabbed the deceased with a knife, and killed him.

I think on the case made by the testimony of the witnesses for the People alone, the prisoner, without being sworn and testifying himself, and without calling a witness, had the right to have the question, whether the homicide was, under the circumstances, justifiable, submitted to the jury in a proper way.

The case made by the evidence on the part of the People, relieved the prisoner from the burden of showing, on his part, that the fatal wound was given, during or in an affray, and under circumstances which gave him the right to have the question as to the justifiableness of the homicide submitted to the jury.

It is not necessary, therefore, in this case, to determine whether the charge of the Court to the jury would have been right, had the burden been on the prisoner to show

that the homicide was committed in an affray, and under circumstances which gave him the right to have the question of justifiableness submitted to the jury.

It is clear, taking the case made by the evidence on the part of the People, that the following part of the charge, to-wit: "The killing in this case, has been proved, and is conceded, and there is no doubt as to the identity of the prisoner. With these conceded facts, the prisoner asserts that the killing was in self-defence, and justified by the law. *It is for him to make this allegation good by proof.* If the defendant has given no proof, tending to show that the act was committed in self-defence, the necessary self-defence of his person, there is no question before you on this point," etc., was erroneous, and was likely to have, and probably did have, a very unjust and improper influence with the jury, in producing their verdict.

The charge tended to deprive the prisoner of the benefit of the circumstances under which the homicide was committed, as shown even by the testimony on the part of the People.

The judgment of the General Term of the Supreme Court, reversing the judgment of the Court of Sessions, should be affirmed.

All the judges concurring for affirmance, except INGALLS, J., who did not sit.

Judgment affirmed.

SILVUS v. THE STATE.

[22 OHIO STATE, 90.]

*Supreme Court of Ohio, December Term, 1871.*JOHN WELCH, *Chief Justice.*

WILLIAM WHITE,	} <i>Judges.</i>
LUTHER DAY,	
GEORGE W. McILVAINE,	
WILLIAM H. WEST,	

HOMICIDE IN SELF-DEFENCE—BURDEN AND QUANTUM OF PROOF.

1. On the trial of an indictment for murder, the burden of proving that the homicide was excusable on the ground of self-defence, rests on the defendant, and must be established by a preponderance of the evidence. [Acc. last case.]

Error to the Court of Common Pleas of Athens County.

The defendant was indicted for murder in the second degree, and convicted of manslaughter. It appears from the evidence, that the deceased, Lester Wines, came to his death from a wound in the neck, which severed an artery, and that the wound was inflicted with a knife, by the defendant, while he and the deceased were together in a corn-field, no third person being present. The State among other things, gave in evidence certain confessions of the defendant, in which he stated that what he did to the deceased was done in self-defence.

The defendant testified on his own behalf, and, in effect stated that, a dispute arising between him and the deceased, the latter threatened to beat him, and did strike him, and that he, through fear, and in self-defence, struck the deceased with the knife.

The evidence of the State tended to disprove the grounds of self-defence claimed by the defendant.

The evidence being closed, the Court among other

things, charged the jury as follows: "The defendant having admitted the taking the life of the deceased, Lester Wines, and seeking to show that he took it in self-defence, the burden of proof is on him to show, by a preponderance of evidence, that what he did was necessary to be done in order to save his own life, or to protect himself from enormous bodily harm."

And the Court also charged as follows: "In order that the defendant may avail himself of the plea of self-defence, it is necessary that he show the jury, by a preponderance of evidence, that when he struck the mortal blow, he was actuated by fear and apprehension of death or great bodily harm, at the hands of the deceased, Lester Wines; and, moreover, that he had reasonable grounds for entertaining such fear and apprehension. The mere fact that the defendant is an old man is not conclusive of this question. But the jury will look to all the circumstances of the transaction, as well as the relative age and strength of the parties." To these instructions, the defendant excepted.

And the defendant's counsel asked the Court to instruct the jury as follows: "That the State must prove to the jury, beyond a reasonable doubt, that the killing of Lester Wines was unlawful, and that the blow that caused the death of Lester Wines, was struck unlawfully and not in self-defence, and if the State shall fail to satisfy the jury, beyond a reasonable doubt, that the said killing was done unlawfully, then the verdict must be for the defendant." This instruction the Court refused to give, and the defendant excepted.

Sentence having been pronounced against the defendant, the case is brought here, on writ of error, for reversal of the sentence and for a new trial, on the ground that the Court erred in its charge to the jury, and in refusing to charge as asked.

W. Reed Golden, and *C. H. Golden*, for plaintiff in error; *Charles Townsend*, Prosecuting-Attorney, for the State.

WHITE, J.: The charge of the Court in this case is to be understood in the light of the case made by the evidence on the trial. There was no dispute as to the fact that the deceased came to his death from a wound in a vital part, inflicted by the defendant with a deadly weapon. This was admitted by the defendant in his testimony; and he sought to justify or excuse the act on the ground that he did it in self-defence.

The only question, therefore, is, whether the law devolved upon him the burden of showing the existence of the circumstances necessary to constitute a justification or excuse.

The Court in its charge, ruled that it did, and that a preponderance of evidence was all that was required for the purpose. The gist of the instruction which the Court refused was, that the burden was on the State to show, beyond a reasonable doubt, by affirmative evidence, otherwise than by the presumption arising from the homicide, that the fatal wound was *not* inflicted by the defendant in self-defence.

The proposition contained in the instruction would not only destroy the presumptions arising from the homicide, but, by its adoption, what is recognized in the books as a defence, would cease to be such in any just sense, because the burden would be cast upon the State, of destroying its existence in order to support the indictment. We think the ruling of the Court was right, both upon principle and authority. In *Best on Presumptions*, it is said to be a *presumptio juris*, founded partly on the principle that every person must be taken to intend that which is the immediate and natural consequence of his deliberate acts, but deriving additional force from considerations of public policy, that, where the fact of slaying has been proved, malice must be intended, and that all circumstances of justification or extenuation, are to be made out by the accused, unless they appear from the evidence adduced against him. Sec. 129, p. 177. The same doctrine is laid down in *Foster's Crown Cases*,

225; 1 Hawk. P. C., ch. 13, § 32; 1 East P. C., 224, § 12; 4 Bla. Com., 201.

The text writers are fully supported by the adjudged cases.

In Legg's case, reported in Kelyng, 27, John Legg was indicted for the murder of Robert Wise; and "it was upon the evidence agreed, that if one kill another and no sudden quarrel appeareth, this is murder, and it lieth upon the party indicted to prove the sudden quarrel."

In the leading case of *The King v. Oneby*, 2 *Ld. Raym.*, 1493, the question arose on a special verdict. The objection was, that the homicide was on a sudden quarrel, and so but manslaughter; whereupon, Lord Raymond, Ch. J., delivering the unanimous opinion of the Court, stated the rule thus: "In answer to this objection, I must first take notice that when a man is killed, the law will not presume that it was upon a sudden quarrel, unless it is proved to be; and, therefore, in Legg's case, it was agreed upon evidence, that if A. kill B., and no sudden quarrel appears, it is murder; for it lies upon the party indicted to prove the sudden quarrel."

The same principle pervades the later English cases. Thus, in the case of *The King v. Greenacre*, 8 *Car. & Pay.*, 42, Tindal, Ch. J., instructed the jury, thus: "There are several principles of law relating to this subject, one of which is perfectly clear, viz: that where it appears that one person's death has been occasioned by the hands of another, it behooves that other to show from evidence, or by inference from the circumstances of the case, that the offence is of a mitigated character, and does not amount to the crime of murder." See also *Regina v. Kirkham*, *Ib.*, 116.

The same rule was recognized and applied by the Supreme Court of this State in the case of *the State v. Turner*, where the presumption was held to be limited under our statute, to murder in the second degree. *Wright*, 20. And by the Supreme Court of Massachusetts in the case of *The Commonwealth v. York*, 9 *Metcf.*,

93, and in the subsequent case of *The Commonwealth v. Webster*, 5 Cush., 305.

True, in the foregoing cases, the question was on reducing the homicide from a higher to a lower grade. But if the burden is on the defendant to show circumstances of mitigation, *a fortiori*, is the burden on him to show the circumstances to wholly excuse the act.

In *Rex. v. Morrison*, 8 Car. & Pay., 21, the defendant was on trial for manslaughter. It was argued that as no witness was present at the giving of the wounds from which death ensued, it could not be said that it was not accidental. In response to this claim, PARK, J., said: "I cannot agree in that view of the case. Because no person was present, is it to be inferred that it was an accident, without any evidence on the part of the prisoner? I say not." ^a And the learned judge goes on to say, that if the homicide be shown to have been occasioned by the prisoner, "it will be murder or manslaughter, as the circumstances may turn out, unless it is shown by the prisoner to have been occasioned by accident."

And in the late case of *The People v. Schryver*,^b before the Court of Appeals of New York, (42 N. Y., 1,) the defendant, on a charge of manslaughter, set up that he killed the deceased in self-defence. The Court held that "the People, in every case of homicide, must prove the *corpus delicti* beyond a reasonable doubt, and if the prisoner claims a justification, he must take upon himself the burden of satisfying the jury by a preponderance of evidence." And it was said: "He must produce the same degree of proof that would be required, if the blow inflicted had not produced death, and he had been sued

^a The very absurdity of this conclusion carries with it its own refutation. In England, and in most of the American States, the prisoner's mouth is sealed, and he is not allowed to utter a word of explanation which can have the effect of *evidence* before the jury. And, what is more barbarous, *his wife* could not, if she were present. How, then, in many cases, is he to show by evidence, if no person was present, that the killing was accidental?—EDS.

^b *Ante*, last case.

for assault and battery, and had set up a justification."

A like principle prevails where the defence of insanity is set up. The materiality of the fact of insanity upon the issue, is to rebut the criminal intent of the injurious act, which is presumed to exist from sanity. In regard to this defence, the rule is, that the burden is on the defendant to establish it by a preponderance of evidence. *Clark v. State*, 12 Ohio, 494; *Loeffner v. State*, 10 Ohio St., 599; *Commonwealth v. Eddy*, 7 Gray, 583.

The principle of these decisions is, that, in judicial investigation, facts legally presumed are, until rebutted, as effectual as facts proved. And where a party claims to control the legal effect of facts by the alleged existence of other facts, the burden is on him to show a preponderance of evidence in favor of the existence of the latter. Facts which are neither proved, nor to be presumed, are, for judicial purposes, regarded as not existing.

In regard to the suggestion that the charge was calculated to mislead the jury, by depriving the defendant of the benefit of grounds of justification or excuse arising out of evidence produced by The State, we deem it only necessary to say, we do not think the charge can be fairly understood as withdrawing from the consideration of the jury, any evidence in the case, tending to show such justification or excuse. We understand the meaning of the charge to be no more than this, that the burden was on the defendant to show, from the evidence in the case, that the grounds of self-defence existed, which would justify him in taking the life of the deceased.

Judgment affirmed.

STOKES v. THE PEOPLE.

[53 N. Y.—]

*Court of Appeals of New York, June, 1873.*SANFORD E. CHURCH, *Chief Justice.*

WILLIAM F. ALLEN,

RUFUS W. PECKHAM,

MARTIN GROVER,

CHARLES J. FOLGER,

CHARLES A. RAPALLO,

CHARLES ANDREWS,

} *Judges.*

HOMICIDE—THREATS, COMMUNICATED AND UNCOMMUNICATED—MALICE NOT PRESUMED FROM FACT OF KILLING—BURDEN DOES NOT SHIFT UPON PRISONER—SUFFICIENT IF PRISONER RAISE A DOUBT THAT THE KILLING WAS FELONIOUS.

1. In trials for homicide, evidence of threats made by the deceased against the accused, and communicated to the deceased before the killing, is admissible as tending to create a belief in the mind of the accused that his life was in danger, or that he had reason to apprehend some great bodily harm from the acts and motions of the deceased.

2. Where evidence has been given, making it a question for the jury whether the killing was excusable self-defence, evidence of threats made by the deceased against the accused a short time before the killing, but not communicated to the accused before the killing, is equally admissible. [Acc. Campbell's case, *ante*, p. 282; Little's case, *ante*, p. 487; Goodrich's case, *ante*, p. 532; Holler's case, *ante*, p. 565; Keener's case, *ante*, p. 531; Cornelius v. Com., 15 B., Monr., 539; Pitman's case, *ante*, p. 574; Howell's case, in note to Monroe's case, *ante*, p. 469; Riddle v. Brown, in note to Goodrich's case, *ante*, p. 538; Scoggin's case, *ante*, p. 596, and Arnold's case, in note to Scoggin's case, *ante*, p. 600. Contra, Powell v. State, *ante*, p. 587, note; Atkins v. State, *ante*, p. 576, note; Ling v. State, *ante*, p. 556, note; Newcomb v. State, *ante*, p. 613, note; People v. Henderson, 28 Cal. 465.]

3. The Court charged the jury as follows: "The fact of the killing in this case being substantially conceded, it becomes the duty of the prisoner here to satisfy you that it was not murder, which the law would imply from the fact of the killing under the circumstances, in the absence of explanation that it was manslaughter in the third degree or justifiable homicide; because, as I have said, the fact of killing being conceded, and the law implying malice from the circumstances of the case, the prosecutor's case is fully and entirely made out, and, therefore, you can have no reasonable doubt as to that, unless the prisoner shall give evidence sufficient to satisfy you that it was justifiable under the circumstances of the

case." *Held* error and ground of reversal. Acc. Tweedy's case, *ante*, p. 905; The State v. Patterson, 12 Am. Law Reg., N. S. 602. Contra, Schryver's case, *ante*, p. 910; Silvus' case, *ante*, last case.

Lyman Tremaine; John R. Dos Passos, and Cephas Brainerd, for plaintiff in error; *Benjamin K. Phelps*, District Attorney, and *William Fullerton*, for The People.

GROVER, J.: * * * * The counsel for the accused offered to prove that the deceased, a short time before the occurrence, had made violent threats against him, such as that he "would beggar him first, and then kill him;" "I go prepared for him all the time; so sure as my name is Jim Fisk, I will kill him;" "I would kill him as soon as I would a ferocious dog." This was objected to by the prosecution, and rejected by the Court, to which the counsel for the accused excepted.

In determining the competency of this testimony, it must be borne in mind, that evidence had been given, making it a question for the jury, whether the case was one of excusable homicide, upon the ground that the act was perpetrated by the accused in defending himself against an attempt by the deceased to murder or inflict some great bodily injury upon him, and the further question, whether it was not perpetrated in resisting an attack made upon him by the deceased, from which he had reasonable ground to apprehend a design to murder or inflict upon him some great bodily injury.

Evidence of threats made by the deceased, which had been communicated to the accused, was received by the Court.

Proof of the latter facts was competent, as tending to create a belief in the mind of the accused, that his life was in danger, or that he had reason to apprehend some great bodily harm from the acts and motions of the deceased, when in the absence of such threats, such acts and motions would cause no such belief. But why admissible upon this ground? For the reason that threats made would make an attempt to execute them

probable when an opportunity occurred, and the more ready belief of the accused would be justified to the precise extent of the probability.

But an attempt to execute threats is equally probable when not communicated to the party threatened, as when they are so, and when, as in this case, the question is whether the attempt was in fact made, we can see no reason for excluding them in the former, that would not be equally cogent for the exclusion of the latter, the latter being admissible only for the reason that the person threatened, would the more readily believe himself endangered by the probability of an attempt to execute such threats.

Threats to commit the crime for which a person is upon trial are constantly received as evidence against him, as circumstances proper to be considered in determining the question whether he has in fact committed the crime, for the reason that the threats indicate an intention to do it, and the existence of this intention creates a probability that he has in fact committed it.

Had the deceased, just previous to his going into the hotel, where the transaction occurred, declared that he was going there to kill the accused, and that he was prepared to execute this purpose, we think the evidence would have been competent, upon the question whether he had in fact made the attempt, when that question was litigated. And yet there is in principle, no difference between this and the testimony offered and rejected. The difference is only in degree.

We are not aware of any decision of the precise question by the Courts of this State, but there have been several in accordance with the above views in other States. *Keener v. The State*,^a 18 Ga., 194; *Pritchett v. State*,^b 22 Ala., 39; *Campbell v. People*,^c 16 Ill., 17; *Cornelius v. Commonwealth*, 15 B. Monroe, 539.

In *Jewitt v. Banning*, 21 N. Y., 27, it was held, that in an action for an assault and battery, alleged to have been committed by the defendant upon the plaintiff,

^a *Ante*, p. 531. ^b *Ante*, p. 635. ^c *Ante*, p. 282.

when no witnesses were present, proof of previous ill-will by the defendant against the plaintiff was competent, as a circumstance tending to show the commission of the acts charged by the plaintiff. This accords with the view above taken. I think the testimony offered was competent, and the exception to its exclusion well taken. The error was one prejudicial to the accused, by depriving him of the right to have competent testimony in his favor considered by the jury, and cannot be overlooked by the Court.

[The learned judge here considered a point relating to the impeachment of a witness, and also an error committed in admitting as evidence on behalf of the People, the minutes of the Grand Jury, to show that Stokes had been indicted for blackmailing, Fisk being the prosecutor; and then proceeded as follows:]

Near the conclusion, the judge charged the jury, as follows: "The fact of the killing in this case being substantially conceded, it becomes the duty of the prisoner here, to satisfy you that it was not murder which the law would imply from the fact of killing under the circumstances, in the absence of explanation that it was manslaughter in the third degree or justifiable homicide; because, as I have said, the fact of killing being conceded, and the law implying motive* from the circumstances of the case, the prosecutor's case is fully and entirely made out, and, therefore, you can have no reasonable doubt as to that, unless the prisoner shall give evidence sufficient to satisfy you that it was justifiable under the circumstances of the case."

To this portion of the charge, the counsel for the prisoner excepted. We have examined this portion of the charge, to determine whether the idea intended to be conveyed to the jury, and which they would derive therefrom, was that the law implied that the act of killing was murder, when perpetrated under the circumstances of the present case, or whether such was the legal implication

* Malice? See the instruction as quoted by RAPALLO, J., *infra*.

from the proof of killing, in the absence of proof of the circumstances of its perpetration, by which the case of the prosecution was fully and entirely made out, unless the prisoner had satisfied them that it was not murder, which the law would imply from the fact of the killing. We think a careful examination of the entire portion of the charge excepted to, will show that the latter was the idea intended to be conveyed, and that the jury must have so understood it.

From the opinions delivered, it was so understood by the justices of the Supreme Court at General Term. This view is confirmed by the fact that the circumstances attending the killing in the present case, were controverted questions, to be determined by the jury from evidence more or less conflicting, as claimed by the prosecution, such as would fully authorize a finding by the jury of all the facts constituting the crime of murder in the first degree, as claimed by the prisoner, such as would authorize the jury to find the homicide excusable.

It can hardly be supposed, that, under such proof as to what the circumstances really were, the judge intended to charge the jury, that the law implied the crime of murder from proof of killing under the circumstances of the case, and upon such proof such an instruction would have been erroneous. The instruction in effect, was, and the jury must so have understood it, that the law implied motive, and consequently the crime of murder in the first degree from the proof of killing the deceased by the prisoner, and that upon this proof, they should find him guilty of that crime, unless he had given evidence satisfying them that it was manslaughter or excusable homicide.

This is further confirmed by what immediately follows the portion of the charge excepted to. The judge proceeds to instruct the jury, as follows: "Ordinarily, naturally and properly in cases of this kind, juries are disposed to and should give the prisoner the benefit of any reasonable doubt that may exist in the case, and I do not know that even this is an exception to that rule. If the

evidence shall be doubtful upon that subject, if you shall entertain reasonable doubt, if the evidence is evenly balanced so you do not know where the truth lies, the prisoner would be entitled to the benefit of that doubt."

But for the idea conveyed by the part of the charge excepted to, that the law implied the crime of murder in the first degree from the proof of killing only, unless the prisoner satisfied them it was not murder, the benefit of the doubt to be given to the prisoner would not have been restricted to their finding the evidence evenly balanced, so that they did not know where the truth lay; on the contrary, the instruction would have been not to convict of that crime, unless convinced by all the evidence in the case that he was guilty, and that if a careful examination of all the evidence, left in their minds reasonable doubts of his guilt, they should give the prisoner the benefit by an acquittal. This instruction was warranted by the common law of England. 1 Hale P. C., 445; 1 East P. C., 34; 3 Maule & Selw., 15; Regina v. Chapman, 2 Eng. R., 12; Cox Crim. Cases, 4; Commonwealth v. York, 9 Metcalf, (Mass.) 93

This rule can be upheld by authority, only, as it obviously is in contravention of principle and the analogies of the law. It is a maxim in the law, that innocence is presumed until the contrary is proved. How is guilt established by proof only of one of the ingredients essential to constitute crime? To constitute crime, there must not only be the act but also the criminal intention, and these must concur, the latter being equally essential with the former.

Actus non reum facit sed mens, is a maxim of the common law. The intention may be inferred from the act; but this in principle is an inference of fact to be drawn by the jury, and not an implication of law to be applied by the Court. But the question in this case is not what was the rule of the common law as to the implication of malice from the act, whether such rule is deduced from authority or principle in legal analogies. The question arises upon the statute of the State, by

which homicide is made justifiable or excusable, murder in the first or second degree, or manslaughter in one of four degrees, determinable by the intention and circumstances of its perpetration. Under the statute, it is obvious that mere proof that one has been deprived of life by the act of another, utterly fails to show the class of homicide under the statute.

Section 3 of title 2 of the statute, declares in what cases the homicide when perpetrated by an individual shall be justifiable.

Section 2 of title 1, as amended by the Act of 1872, provides that such killing, unless it be manslaughter, excusable or justifiable homicide, shall be murder in the first degree in the following cases:

First. When perpetrated from a premeditated design to effect the death of the person killed, or of any human being. It was under this provision that the prosecution sought to convict the prisoner. To justify such conviction, it was necessary for the prosecution to prove all the facts bringing the case of the prisoner within it. Mere proof of the killing did not as a legal implication show this. It might still be murder in the second degree, manslaughter in some degree, or justifiable or excusable homicide, consistent with such proof.

It was error to instruct the jury, that the law implied all these facts from the proof of the killing. The correctness of this has rarely been questioned since the enactment of the statute. Hence, there has been but little said by the courts upon the question, but what has been said, sustains it. *People v. Clark*, 7 N. Y., 393; *Fitzgerald v. People*, 37 N. Y., 418; *People v. White*, 24 Wend., 520; *Wilson v. People*, 4 Parker, 619. The General Term was correct in the conclusion that this part of the charge was erroneous, and in the further conclusion that to obviate the error, it was for the People to show that the prisoner was not prejudiced by such error. *Greene v. White*, 37 N. Y., 405; *Clark v. Dutcher*, 9 Cowen, 674; *People v. Wiley*, 3 Hill, (N. Y.) 194.

We have examined the entire charge to determine

whether it does so show. We find that the judge correctly charged the jury as to the facts necessary to constitute the crime of murder in the first degree, and further, that he correctly instructed them that the People must prove all these facts, to authorize the jury to render a verdict convicting him of that crime.

But how does this cure the error of the instruction, that the law implied all the necessary additional facts from the proof of the killing? It was in effect instructing the jury, that although the People must prove all these facts, yet they have done so by proving the killing, and by that the case of the prosecution was fully and entirely made out, and that this proof made it the duty of the prisoner to satisfy them that it was not murder, which the law would imply from that proof, thus in effect instructing the jury that the proof the killing cast the burden of proof upon the prisoner to show that it was not murder, but manslaughter or justifiable homicide.

No such burden of proof was by that cast upon the prisoner. *Lamb v. C. & A. R. R. Co.*, 46 N. Y., 271.

The further instruction to the jury, to the effect that the law required no particular length of time between forming the design to kill, and the act by which the death was effected, had no relation to or bearing upon the point in question. The jury may as matter of fact find the design to kill from the act by which death was effected, and all facts, except that of the killing itself, required to constitute murder in the first degree, by proof of circumstances which convince them of the truth of such facts. They are to pass upon the whole case, inferring facts from the proof of other facts which convince their judgment of the truth of the facts inferred, bearing in mind that the burden of proof is upon the prosecution, as to all the facts necessary to constitute guilt during the entire trial, and that their verdict should be the conscientious expression of their convictions derived from all the evidence.

It is unnecessary to pass upon any of the questions

arising upon the offer of the plaintiff in error, to assign error in fact upon the judgment. As to these we will simply remark, that we think they were properly disposed of upon the motion for a new trial.

But for errors in rejecting competent evidence offered by the prisoner, and in receiving incompetent evidence against him, and in the part of the charge excepted to, the judgment must be reversed and a new trial ordered.

RAPALLO, J.: I am satisfied that the conviction in this case cannot be sustained without the violation of settled principles of law, and it necessarily follows that I must vote for a reversal.

While concurring in the reasons assigned by my learned associates for coming to the same conclusion, I will briefly state the considerations which to me seem controlling, independently of the numerous other points which have been discussed. It is a cardinal rule in criminal prosecutions, that the burden of proof rests upon the prosecutor, and that if, upon the whole evidence, including that of the defence, as well as of the prosecution, the jury entertain a reasonable doubt of the guilt of the accused, he is entitled to the benefit of that doubt. The jury must be satisfied on the whole evidence, of the guilt of the accused, and it is clear error to charge them, when the prosecution has made out a *prima facie* case, and evidence has been introduced tending to show a defence, that they must convict, unless they are satisfied of the truth of the defence. Such a charge shows the burden of proof upon the prisoner, and subjects him to a conviction, though the evidence on his part may have created a reasonable doubt in the minds of the jury, as to his guilt. Instead of leaving it to them to determine upon the whole evidence, whether his guilt is established beyond a reasonable doubt, it constrains them to convict, unless they are fully satisfied that he has proved his innocence.

The charge in this case, was, in my judgment, calculated to convey to the jury that erroneous rule for their guidance. They were virtually instructed that the kill-

ing being conceded, they should convict of the crime of murder, unless the proofs adduced by the prisoner satisfied them that the circumstances under which the killing took place, were such as to justify his act, or reduce the grade of his offence. Though, upon the whole evidence, they might be in doubt as to what the circumstances really were, the killing being conceded, this charge indicated that it was their duty to convict.

The language of the charge to which exception was taken, is as follows:

"The fact of killing in this case being substantially conceded, it becomes the duty of the prisoner here *to satisfy you that it was not murder*, which the law would imply from the fact of the killing under the circumstances, in the absence of explanation that it was manslaughter in the third degree, or justifiable homicide; because, as I have said, the fact of killing being conceded, and the law implying malice from the circumstances of the case, the prosecution's case is fully and entirely made out; *and, therefore, you can have no reasonable doubt as to that*, unless the prisoner shall give evidence *sufficient to satisfy you*, that it was *justifiable* under the circumstances of the case."

Argument seems unnecessary to demonstrate the error of this charge. It was a necessary part of the case of the prosecution, to establish that the homicide was perpetrated, with a premeditated design to effect the death of the person killed—yet the Court, assuming to determine what the circumstances of the killing were, solemnly instructed the jury that the fact of killing being conceded, the law implied malice from the circumstances of the case, and that the case on the part of the prosecution was fully made out, and that the jury *could have no reasonable doubt as to that*, unless the evidence on the part of the prisoner *satisfied them* that the killing was justifiable.

The Supreme Court in sustaining the judgment of the Court of Oyer and Terminer, do not attempt to defend the legality of this charge. On the contrary,

the very able opinion of Fancher, J., conclusively demonstrates upon authority, that it is at variance with numerous adjudications and the settled law upon the subject.

But it is claimed that the error may be overlooked, on the ground that the prisoner was not prejudiced thereby, and cases are cited which decide, that where it appears to the Appellate Court that error has been committed, yet, that the error could not possibly have prejudiced the party complaining, it will not be made a ground of reversal either in civil or criminal cases.

In all these cases it will be found that the Court has been exceedingly careful so to limit this rule, as to render it applicable only where by no possibility could the error have produced injury, and even this was an innovation upon ancient rules, under which it was a matter of course to reverse when error appeared, without enquiring into its materiality.

That so vital an error as one which should or might mislead the jury on the question as to the party on whom the burden of proof rested, could come within the category of those which could not possibly prejudice the determination of the case, is utterly inadmissible. Nothing short of an unequivocal retraction of that portion of the charge, could have removed from the minds of the jury, the impression which it was calculated to produce. It was the concluding portion of the charge, and afforded the jury a simple rule for their guidance in their consultation. The fact of killing was, as they were told, *conceded*. They were further told, that it was the duty of the prisoner to satisfy them that this killing was not murder. That the law implying malice from the circumstances of the case, the prosecution's case was fully and entirely made out, and, therefore, they could have no reasonable doubt as to that, unless the evidence on the part of the prisoner *satisfied them* that it was justifiable under the circumstances. Their enquiry was thus reduced to whether they were *satisfied* of the truth of the *allegations* on the part of the defence. If they were in

doubt whether these were true or not, they were bound to convict.

It seems to have struck the mind of the learned judge at the time, that the rule thus laid down by him, encroached somewhat upon the principle that the prisoner was entitled to the benefit of a reasonable doubt, and he immediately followed by stating that, ordinarily, juries should give the prisoner the benefit of any doubt that may exist in the case, and that he did not know that even this was an exception to the rule, and he proceeded to instruct them generally upon the subject of reasonable doubts.

It is impossible that we should know whether these instructions effectually eradicated from the minds of the jury, the erroneous impression calculated to be produced by the previous portions of the charge, and we cannot, therefore, pronounce as a conclusion of law, that it had no influence upon the verdict.

Whether, under a proper charge, the jury would have come to the same result, it is not within our province to decide. The determination of the facts rests wholly with the jury. It is for the Court to instruct them as to the law, and these instructions they are bound to follow. If materially erroneous, it is the imperative duty of the appellate tribunal to grant a new trial.

All the judges concurred.

New trial granted.

NOTE.—It was our intention to make a note upon the questions embraced in the four preceding cases. The subject is a most fruitful one, and much could profitably be said upon it; but the unexpected size which this volume has attained, precludes us from entering upon it. We would, however, call attention to an able and exhaustive article on the question in the American Law Review for October, 1873, in which the case of Stokes is shown to be against the great weight of authority, though not entirely without support. It is evident that the profession are becoming more and more dissatisfied with the doctrine that malice is to be presumed from the proof of killing without more, and also with the doctrine that, the fact of the killing being established, the burden shifts upon the defendant, of showing circumstances of excuse or justification. In addition to Stokes' case in New York, and Tweedy's case in Iowa, we may note that the doctrine seems to be greatly shaken, if not overthrown, in

Michigan, by the very able Supreme Court of that State, in *Maher v. The People*, 10 Mich., 212. See, also, the recent cases of *State v. Murphy*, 33 Iowa, 270, and *State v. Porter*, 34 Iowa, 131.

INDEX.

[The references are either to the first page of the case or to the page on which the point is ruled, or to both.]

APPEARANCES OF DANGER.

Consult in connection with this title, **IMMINENCE OF DANGER.**

1. To justify homicide, it is sufficient if the danger be apparent, though unreal. Wiltberger's case, 34; Shorter's case, 258; Logue's case, 269; Campbell's case, 282; Schnier's case, 286; Meredith's case, 298. Or reasonably apparent. Selfridge's case, 4, 18; Sullivan's case, 70; Neeley's case, 96; Forster's case, 143; Drum's case, 186; Shorter's case, 258. Instructions tested by this rule and held not erroneous. Sullivan's case, 70; Neeley's case, 101; note, 104; Lamb's case, 646.
2. If there is reasonable ground for believing that there is a design to destroy life, to rob or commit a felony, a killing to arrest such design is justifiable. Harris' case, 276; Young's case, 401, note; Pond's case, 814.
3. The danger must be actual. Selfridge's case, 4; Thompson's case, 95. No contingent necessity will avail. Thompson's case, 95. And examine Neeley's case, 196.
4. The rule of Wharton's Criminal Law, § 1020, that to excuse homicide on the ground of self-defence, the danger must be *actual* and urgent, examined and criticized. Note, 104.
5. It is sufficient if there be actual danger, to the defendant's comprehension as a reasonable man. The enquiry is, not whether the harm apprehended was actually intended by the assailant, but was it actual and real *to the accused*, as a reasonable man, as compared with danger remote or contingent. Collins' case, 596, note.
6. The belief that a person designs to kill me, will not prevent my killing him from being murder, unless he is making some attempt to execute his design, or, at least, is in an apparent situation to do so, and thereby induces me reasonably to think that he intends to do it immediately. Scott's case, 171; Harrison's case, 71; Lander's case, 366, Newcomb's case 614, note.
7. A killing through fear, alarm or cowardice is excusable. Grainger's case, 238. Contra, Thompson's case, 95, 96; Shorter's case, 256; Shippey's case, 136; Lander's case, 366; and cases collected in note, 242, *et seq.*

6. Declarations of actor made at time of act, always part of *res gesta*. Monroe's case, 462.
7. When declarations of defendant antecedent to the fact are admissible. *Ibid*.
8. Evidence of nervous sensitiveness not amounting to insanity, not admissible for defendant on trial for homicide. Shoulitz' case, 242, note. *Contra*, Seibert's case, 686, note.
9. As a general rule, it is expedient to receive all the evidence, in a trial for murder, which goes to show the state of feeling of prisoner and deceased toward each other. Monroe's case, 468; Zeller's case, 472; and see Goodrich's case, 532; Murphy v. Dart, 538, note; Riddle v. Brown, 538, note; Keener's case, 539.
10. Hence, error to refuse evidence that defendant had acted as prosecutor against deceased for embezzlement. Monroe's case, 468.
11. Evidence of lawsuits and quarrels between the parties admissible. Zeller's case, 473.
12. Evidence of previous quarrel not admissible for defendant in Louisiana. Jackson's case, 475, note.
13. The question of admitting evidence of previous threats, injuries, etc., in mitigation of the quantum of punishment, in trials for homicide, discussed. Note, 475.
14. The jury instructed to look into the feelings of deceased towards prisoner, as a circumstance making it probable that he might have made the attack, etc. Nelson's case, 491, note; Seibert's case, 686, note.
15. Evidence of previous affrays, attacks, threats, etc., admissible, if there be other evidence showing just cause for alarm; otherwise, if offered merely to show the temper of prosecuting witness toward defendant. Goodrich's case, 533.
16. All the circumstances of a transaction may be admitted in evidence, provided they afford any fair presumption as to the matter in issue. Keener's case, 552.
17. Any circumstances which go to show the character of the attack, the intention with which it was made, and the grounds of fear on which the defendant acted, are admissible. Duke's case, 573, note.
18. A previous difficulty between deceased and a servant of defendant, not admissible. Dupree's case, 582. According with People v. Henderson, 28 Cal., 469; Harmon v. State, 3 Head, 243.
19. Any fact which tends to prove the real motive of the prisoner in killing the deceased, or the purpose of the deceased in going to the prisoner's house, or that the prisoner knew, at the time of the killing, that the deceased and his companions did not intend to commit any felony, nor to do him any great bodily harm, is relevant evidence; as that an affidavit for the arrest of the accused had been sworn out before a justice, and the deceased deputed to execute it. Noles' case, 697. So, evidence tending to show a state of facts, the converse of the above, is admissible in behalf of the accused. Goodrich's case,

20. The killing must seem to be necessary to save the defendant from death or great bodily harm: to omit the latter in instructing a jury, is error. Benham's case, 123; Burke's case, 126.
21. Men, when threatened with danger, must determine from the state of things surrounding them, as to the necessity of resorting to self-defence; and if they act from reasonable and honest convictions, they will not be held responsible criminally, for a mistake in the extent of the actual danger, where other judicious men would have been alike mistaken. Campbell's case, 285.
22. The necessity must be such as to induce a belief in a reasonable mind that no other means exists, but to take the life of the adversary. Schnier's case, 286.
23. Or in the mind of a prudent man. Maher's case, 290.
24. The defendant must have had reasonable ground to believe, and must have actually believed, that the other intended to proceed immediately to the infliction of bodily harm, to justify stabbing as in self-defence. Rapp's case, 293.
25. It is erroneous to tell the jury that the killing was excusable, if the defendant had no safe means of escaping. The rule is, if to the comprehension of a reasonable man he had no safe means of escaping, etc. Meredith's case, 301.
26. The law allows in the defence of a man's person or property, such means as are necessary. In the selection and exercise of the means, he must, of necessity, exercise his own judgment. It is done at his peril; and if he goes beyond what is necessary and thus violates the law, he must abide the consequences. In the exercise of his judgment, he must act rationally. This is required, and nothing less will suffice. Ibid, 302.
27. A reasonable belief that another intends to inflict some serious bodily harm, and that he is in such a position that he may carry his intention into effect, will not excuse a killing of such person, unless there be an overt act indicating such a present intention. Hinton's case, 87, 88.
28. In Mississippi, a person is justified in slaying, if he act conscientiously, upon reasonable fears, founded upon present overt acts, to all appearances hostile, although there may have been no actual danger at the time. Dyson's case, 304. And so in Texas. Hinton's case, 87, 88.
29. Under the Mississippi statute, reasonable ground of apprehension, and imminent danger of accomplishment of a felony, must both co-exist. Cotton's case, 315.
30. A party may have a lively apprehension that his life is in danger, and believe that the ground of his apprehension is just and reasonable; but if he act upon such belief, and take the life of a human being, he does so at his peril. He is not the final judge, whatever his apprehension or belief may have been, of the reasonableness of the grounds on which he acted. Wesley's case, 326, 327; Evans' case, 340.

whether it does so show. We find that the judge correctly charged the jury as to the facts necessary to constitute the crime of murder in the first degree, and further, that he correctly instructed them that the People must prove all these facts, to authorize the jury to render a verdict convicting him of that crime.

But how does this cure the error of the instruction, that the law implied all the necessary additional facts from the proof of the killing? It was in effect instructing the jury, that although the People must prove all these facts, yet they have done so by proving the killing, and by that the case of the prosecution was fully and entirely made out, and that this proof made it the duty of the prisoner to satisfy them that it was not murder, which the law would imply from that proof, thus in effect instructing the jury that the proof the killing cast the burden of proof upon the prisoner to show that it was not murder, but manslaughter or justifiable homicide.

No such burden of proof was by that cast upon the prisoner. *Lamb v. C. & A. R. R. Co.*, 46 N. Y., 271.

The further instruction to the jury, to the effect that the law required no particular length of time between forming the design to kill, and the act by which the death was effected, had no relation to or bearing upon the point in question. The jury may as matter of fact find the design to kill from the act by which death was effected, and all facts, except that of the killing itself, required to constitute murder in the first degree, by proof of circumstances which convince them of the truth of such facts. They are to pass upon the whole case, inferring facts from the proof of other facts which convince their judgment of the truth of the facts inferred, bearing in mind that the burden of proof is upon the prosecution, as to all the facts necessary to constitute guilt during the entire trial, and that their verdict should be the conscientious expression of their convictions derived from all the evidence.

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While concurring in the reasons assigned by my learned associates for coming to the same conclusion, I will briefly state the considerations which to me seem controlling, independently of the numerous other points which have been discussed. It is a cardinal rule in criminal prosecutions, that the burden of proof rests upon the prosecutor, and that if, upon the whole evidence, including that of the defence, as well as of the prosecution, the jury entertain a reasonable doubt of the guilt of the accused, he is entitled to the benefit of that doubt. The jury must be satisfied on the whole evidence, of the guilt of the accused, and it is clear error to charge them, when the prosecution has made out a *prima facie* case, and evidence has been introduced tending to show a defence, that they must convict, unless they are satisfied of the truth of the defence. Such a charge shows the burden of proof upon the prisoner, and subjects him to a conviction, though the evidence on his part may have created a reasonable doubt in the minds of the jury, as to his guilt. Instead of leaving it to them to determine upon the whole evidence, whether his guilt is established beyond a reasonable doubt, it constrains them to convict, unless they are fully satisfied that he has proved his innocence.

The charge in this case, was, in my judgment, calculated to convey to the jury that erroneous rule for their guidance. They were virtually instructed that the kill-

force be used, the defender becomes the assailant. Gallagher's case, 720; 723, note.

3. What acts or demonstrations will justify a man in striking in his defence. 723, note 1.

II. WITH INTENT TO MURDER.

1. In order to convict, the circumstances must be such, that had the assailed person been killed, it would have been murder. Hopkinson's case, 80; Rapp's case, 293.
2. It is not sufficient that the killing, had it been accomplished, would not have been *excusable* or *justifiable*; had it amounted to manslaughter, it would not be sufficient to convict. Ibid.

BARE FEAR.

See APPEARANCES OF DANGER; IMMINENCE OF DANGER.

1. Unaccompanied by overt act, no excuse for killing. Selfridge's case, 4; Shippey's case, 136.
2. At common law, did not extenuate homicide; there must have been actual danger at the time. Dyson's case, 308. *Sed quære*; see note, 309.
3. How far this principle of the common law is modified by the Mississippi Statute. Ibid.
4. A bare fear, though honestly entertained, unaccompanied by overt act, no excuse under the Mississippi Statute. Ibid, 309; Wesley's case, 326.
5. The fear which will excuse homicide must not only be well founded, but honestly entertained. Rippey's case, 345; Williams' case, 349, 361.

BELIEF OF DANGER.

- See APPEARANCES OF DANGER; IMMINENCE OF DANGER.

BISHOP, Mr.

His views on the subject of retreating before taking life commended. Note, 29.

BOOKS OF THE LAW.

Not to be taken by jury to their consultation room. Selfridge's case, 4; Keener's case, 559, and cases there cited.

BURDEN AND QUANTUM OF PROOF—REASONABLE DOUBT.

See MALICE.

1. Upon the prisoner to show justification or excuse, where killing is proved. Drum's case, 186.

2. Unless the matter of justification or excuse grows out of the original transaction. Tweedy's case, 905.
3. If the evidence leaves the prisoner's extenuation in doubt, he cannot be acquitted of all crime, but must be convicted of manslaughter, at least. Drum's case, 190. Contra, Tweedy's case, 905.
4. Where the circumstances attending the killing are in evidence, its character is to be gathered from the entire body of the testimony. Head's case, 341.
5. A killing with a deadly weapon is presumed to be murder; and it devolves upon the accused to show that he is guilty of a less crime or acted in self-defence. Hays' case, 494.
6. In criminal cases the rule is, that the person charged is presumed to be innocent, until he is proven guilty. Tweedy's case, 905.
7. If, upon a consideration of all the evidence, there be a reasonable doubt of the guilt of the party, the jury are to give him the benefit of such doubt. Ibid.
8. Neither a preponderance of evidence, nor any weight of preponderant evidence, is sufficient in a criminal case, unless it generates a full belief of the guilt of the party charged, to the exclusion of all reasonable doubt. Ibid; Stokes' case, 927; The State v. Patterson, 12 Am. Law Reg., N. S., 602.
9. When the evidence relates solely to the original transaction, and forms a part of the *res gestæ*, the defendant has a right to claim that the proof made does not manifest his guilt, because it is left in doubt, whether the act was committed under unjustifiable circumstances. Tweedy's case, 905.
10. Hence, where the matter of excuse or justification of the offence charged, grows out of the original transaction, the defendant is not driven to the necessity of establishing the matter in excuse or justification, by a preponderance of evidence, and much less beyond a reasonable doubt. Ibid.
11. On the trial of an indictment for murder, proof of the killing will not change the burden of proof, where the excuse or justification is apparent on the evidence offered by the prosecution, or arises out of the circumstances attending the homicide. Ibid.
12. Where, on the trial of an indictment for murder, the Court instructed the jury as follows: "1. The facts of excuse or self-defence, must be proven to the minds of the jury, clearly, and beyond a reasonable doubt; otherwise, they must find the defendant guilty of murder or manslaughter. 2. If the jury find that the defendant did kill the deceased, they must be convinced, beyond a reasonable doubt, of the facts offered in justification of the killing; and unless other justifying facts have been proven, they must be satisfied, beyond a reasonable doubt, that the deceased did attack the defendant, with a deadly weapon, and drive him to the wall, before the defendant can justify." *Held*, That the instructions were erroneous. Ibid. Acc. Schryver's case, 910.

13. In trials for homicide, it is incumbent upon the people to establish all the facts alleged in the indictment, beyond a reasonable doubt; but if the defendant seek to justify the homicide on the ground of self-defence, the burden is upon him, to make out such defence; and it is not sufficient in so doing, that he raise a reasonable doubt in his own favor, nor is it required that he establish such defence beyond a reasonable doubt; but he must make such defence appear to the jury by the same preponderance of evidence that is required in civil cases. Schryver's case, 910.
14. But if, in such cases, the facts which give him the right to insist upon such a defence are brought out by the prosecution, it is error to instruct the jury that it is incumbent upon the prisoner to make such a defence good, by proof, or to tell them that, he having offered no proof tending to make out such a defence, the question is not before them. Ibid. Acc. Tweedy's case, 905.
15. The burden of proving that the homicide was excusable on the ground of self-defence, rests on the defendant, and must be established by a preponderance of the evidence. Silvus' case, 921.
16. And it is not error to refuse to instruct the jury that the State must satisfy them beyond a reasonable doubt that the killing was unlawful, or they must acquit. Ibid.
17. The Court charged the jury as follows: "The fact of the killing in this case being substantially conceded, it becomes the duty of the prisoner here to satisfy you that it was not murder, which the law would imply from the fact of the killing under the circumstances, in the absence of explanation that it was manslaughter in the third degree or justifiable homicide; because, as I have said, the fact of killing being conceded, and the law implying malice from the circumstances of the case, the prosecutor's case is fully and entirely made out, and, therefore, you can have no reasonable doubt as to that, unless the prisoner shall give evidence sufficient to satisfy you that it was justifiable under the circumstances of the case." *Held*, error and ground of reversal. Stokes' case, 927.
18. The doctrine of the presumption of malice from the fact of killing; and of the shifting of the burden of proof upon the defendant upon the fact of killing being established; and the degree of proof necessary to authorize an acquittal, where self-defence is urged in justification of the homicide, discussed at length and many authorities cited, in Tweedy's case, 905; Schryver's case, 910; Silvus' case, 921, and Stokes' case, 927.

CASES CRITICIZED, OVERRULED, ETC.

1. The three rules in relation to homicide in self-defence, laid down by PARKER, J., in Selfridge's case, pp. 17, 18, approved in John Doe's case, 64.
2. The doctrine of Grainger's case, 238, that fear, alarm or cowardice will excuse homicide, overruled in Thompson's case, 96; in Shorter's case, 256; in Shippey's case, 136; and in Lander's case, 366.

3. Grainger's case, 238, *as modified by Copeland's case*, 41, declared to be the law. Rippy's case, 345.
4. The law as laid down in Grainger's case, 238, and explained, analyzed and defined in Rippy's case, 345, held to be the law in Tennessee. Williams' case, 361.
5. Phillips' case, 383, reaffirmed in Carico's case, 389; and reaffirmed in part, in Bohannon's case, 395.
6. Carico's case, 389, overruled in part in Bohannon's case, 395.
7. Myers' case, 432, criticized by the editors. Note, 439.
8. Meade's case, 798, note; Rector's case, 796, and Monroe's case, 442, distinguished in Hays' case, 492.
9. *Reins v. People*, 858, note, examined and distinguished in *Greschia's case*, 858-860.

CAUTION TO BE EXERCISED IN ONE'S DEFENCE.

1. A killing in the doing of a lawful act, due caution being used, is excusable. Benham's case, 124.
2. Or where such force is employed as is reasonably necessary. Hinchcliffe's case, 125, 126, note.
3. If a person accidentally kill his antagonist with a loaded weapon, under circumstances in which it is not lawful to use such a weapon in his defence, it is manslaughter. Benham's case, 124.
4. To avoid injuring third persons. *Morris v. Platt*, 768; Aaron's case, 784, note.

CHARACTER,

I. OF THE ACCUSED.

The good character of the accused always to be submitted to the jury, with the other facts and circumstances of the case. Wesley's case, 319; Dupree's case, 582; Dumphrey's case, 685; Reynold's case, 686.

II. OF THE DECEASED FOR VIOLENCE.

1. List of the cases on the subject: Copeland's case, 41; Robertson's case, 151; Cotton's case, 310; Rippy's case, 345; Monroe's case, 467; Garbutt's case, 17 Mich., 16; Robert Jackson's case, 486; Little's case, 487; Keener's case, 546; Quesenberry's case, 549, note; Tackett's case, 615; Barfield's case, 618; Pritchett's case, 635; Franklin's case, 641; Lamb's case, 646; Collins' case, 595, note; State v. Hicks, 680, note; State v. Keene, 681, note; Payne v. Commonwealth, 683, note; Commonwealth v. Seibert, 686, note; State v. Smith, 688, note; Fields v. State, (Ala.), 691, note; Wesley's case, 319; Wright v. State, 484, note; Field's case, (Maine), 629; State v. Tilly, 665, note; Bottoms v. Kent, 666, note; State v. Hogue, 673, note; State v. Thawley, 675, note; State v. Chandler, 676, note; Commonwealth v. York, 676, note; Commonwealth v. Hilliard, 678, note; Commonwealth v. Meade, 679, note; State v. Jackson, 679, note;

- People v. Murray, 681, note; People v. Lombard, 681, note; People v. Edwards, 682, note; Wise v. State, 683, note; State v. Dumphey, 684, note; Reynolds v. People, 685, note; Commonwealth v. Ferrigan, 688, note.
2. Bad character of deceased, no extenuation of the homicide. Robert Jackson's case, 484; Wright's case, 484, note; Barfield's case, 621, 622; Field's case, (Maine), 635; Pritchett's case, 639; Franklin's case, 642; Lamb's case, 661; Hogue's case, 674, 675, note; Jackson's case, (Mo.), 679, 680, note; Hicks' case, 680, note; Murray's case, 681, note; Edwards' case, 682, 683, note; Dumphey's case, 684, note; Ferrigan's case, 44 Penn. St., 386. Contra, Fields v. State, (Ala.), 691, note.
 3. The character of the deceased; her bitter feelings towards the prisoner, as well as the great length of time she had been seeking to do the prisoner injury, are elements to be considered in determining the intention with which the deceased advanced to the attack of the prisoner. Copeland's case, 59.
 4. Where the killing was in mutual combat, and was claimed to have been done in self-defence, evidence was admitted of the character of the deceased—an Indian; of his evil repute among his tribe; of the fact that a portion of his tribe were hostile, and that the deceased himself was under strong suspicions of hostility. Robertson's case, 152.
 5. Such evidence always admissible upon the question of reasonable fears. Cotton's case, 315, 316.
 6. Such evidence not admissible unless drawn into the *res gestæ* by testimony tending to show immediate danger of death, etc. Wesley's case, 323.
 7. Always admissible where threats are proved. Pasch. Dig., Art. 2270; Pridgen's case, 416; Robert Jackson's case, 486. And see Bottoms v. Kent, 667, note.
 8. Admissible in cases of doubt whether the homicide was done from malice or from a principle of self-preservation. Monroe's case, 467; Duke's case, 572, note.
 9. Such evidence admissible, it seems, without reference to the question whether there is evidence tending to show that the accused was in danger of death or great bodily harm at the hands of the deceased. Little's case, 487.
 10. A man may have different characters adapted to different places and localities. Hence, it is competent to enquire, whether witness is acquainted with the general character of the deceased for violence *at the place where the difficulty occurred*. Keener's case, 546.
 11. A slave cannot show in defence of a homicide by him of his overseer, the general management of the deceased on the plantation, with reference to violence and cruelty, or specific acts of unmerciful cruelty committed by him on other slaves, while acting as such overseer. Wesley's case, 319.
 12. Evidence of the turbulent, insolent and impudent character of the deceased (a slave) toward white persons admitted, to raise presump-

- tion of a provocation, where the proof of the facts attending the homicide were *circumstantial* only. Tackett's case, 615. [This case severely criticized in a subsequent case in the same State. *Bottoms v. Kent*, note, pp. 617, 667.]
13. Evidence of the general character and habits of the deceased as to temper and violence not admissible, unless, possibly, where the evidence as to the homicide is wholly circumstantial. Barfield's case, 618; BATTLE, J., dissenting: Such evidence is admissible in all cases where the enquiry is, whether the defendant acted from malice or upon legal provocation or excuse. *Ibid*, 625.
 14. Evidence that the deceased was well known by the accused and others to be a drunken, quarrelsome, savage, dangerous man, held incompetent where the killing was in a personal conflict. Field's case, (Maine), 629.
 15. The circumstances under which such evidence is admissible, and the reasons which support its admission, discussed and stated in Pritchett's case, 636.
 16. Where an ill-feeling existed between the prisoner and deceased; and the deceased had made violent threats against the prisoner, which had been communicated to him, and had, the day before the killing, made an assault upon the prisoner with deadly weapons; and the prisoner loaded his gun and went to the house of the deceased, and there shot and killed the deceased, *it was held*, that evidence of the character for violence of the deceased was properly excluded. Pritchett's case, 635. [Under parallel circumstances in a later case in the same State, such evidence is held admissible in *mitigation of the punishment*. *Fields v. The State*, 693, note.]
 17. Such evidence is held admissible where it qualifies, explains, and gives meaning and point to the conduct of the deceased. Franklin's case, 641; Pritchett's case, 635.
 18. The judge should determine as a preliminary question whether such evidence is admissible. Franklin's case, 641. But see Robert Jackson's case, 476; Pridgen's case, 416.
 19. Where the prisoner and deceased were brothers, and the deceased came to the house where prisoner was, with a loaded gun, and used reproachful language, but no threats; and the prisoner complained that he was unarmed, and the deceased thereupon gave him his gun and walked away a few steps, and was in the act of sitting down, when the prisoner shot and killed him with the gun;—*it was held*, that evidence of the character of the deceased for violence was properly excluded. Franklin's case, 641.
 20. Character of deceased cannot, in general, be drawn in question. Lamb's case, 646, DAVIES, Ch. J.
 21. Such evidence can only be admitted in connection with evidence of an assault threatened or committed, or where a doubt is created as to whether the homicide was committed from malice or to repel an assault, or from a principle of self-defence. Lamb's case, 646, DAVIES, Ch. J.

22. The evidence in this case set out at length, and *held* that no such question could arise thereon. *Ibid.*
23. Before such evidence can be admitted, it must be shown that an assault was committed or threatened by the person slain at the time of the homicide, or so immediately preceding it, or so intimately connected with it, as to justify the taking of life in self-defence, or to ward off great, impending and imminent danger of bodily harm. *Ibid.*
24. And it must in every case be made to appear that the defendant *knew* of such character; and although a husband may be presumed to know the character of his wife, yet it seems that in such a case, such knowledge ought to be affirmatively proven. *Ibid.*
25. Where the evidence as to the homicide was circumstantial, and the parties had threatened each other, and the defendant was a tenant of the deceased, evidence that the deceased was high tempered, overbearing and oppressive towards his overseers and tenants, was held properly ruled out. *Tilly's case*, 665, note.
26. The question of admitting evidence of character as presumptive evidence in various cases exhaustively discussed, and many authorities cited, in *Bottoms v. Kent*, 666-673, note.
27. Where the killing was in combat, both parties using deadly weapons, and the attack being mutual, evidence of the *general character of the deceased* was held inadmissible. *Hogue's case*, 673, note.
28. Where on an indictment for murder, it was urged that the blow was struck in self-defence, it was held proper to refuse to permit a witness to testify that the deceased was a violent man, and in the habit of attacking others with dangerous weapons. [The facts are not stated, nor is any satisfactory reason, except lack of precedent, given for the ruling.] *Thawley's case*, 675, note.
29. In a case where the evidence was conflicting as to whether the killing was in combat and upon provocation, evidence that the deceased was a man of notoriously quarrelsome and fighting habits, and boasted of his powers as a fighter, was excluded. [But observe the strong reasoning of *Mr. Dana* in support of the motion, and the inconclusive answer of the Court.] *York's case*, 676, note.
30. Where there was evidence that there was an assault by deceased upon defendant immediately before inflicting the mortal blow, evidence that the general character and habits of the deceased were those of a quarrelsome, fighting, vindictive and brutal man of great strength, was excluded. *Hilliard's case*, 678, note.
31. Where the killing was in combat, and the defendant offered evidence that the deceased advanced and seized him by the throat, and that a brother of the deceased stood by with an uplifted spade, the Court refused to permit him to prove that the deceased was an experienced and practiced garroter, and excluded medical testimony, that from the manner of the death the deceased must have been a remarkably powerful man. *Meade's case*, (Mass.), 679, note.
32. Where there was evidence that the shooting (with intent to murder) was done with express malice, and the prosecutor told the defendant

- “not to shoot; he was unarmed;” evidence of the character of the man shot, for danger and desperation, was held properly excluded. Jackson’s case, (Mo.), 679, note.
33. In a later case of homicide in Missouri, where there had been bitter hostility between the parties, and both were armed at the time of the killing, evidence that the deceased was a turbulent, violent and dangerous man, was admitted, and it was held error to refuse to instruct the jury as to the weight of such evidence. Hicks’ case, 680, note.
 34. And ruled in the same case, that the rash, turbulent and violent disposition of the deceased, if *known* to the defendant, is a circumstance to be considered by the jury in estimating the reasonable cause for defendant’s apprehension. *Ibid.*
 35. And ruled in a later case in the same State, that such evidence ought to be admitted, where it is doubtful whether the killing was done maliciously, or upon a well grounded apprehension of danger. Keene’s case, 681, note.
 36. Such evidence will not be admitted unless the circumstances *raise a doubt* as to whether the killing was in self-defence. Murray’s case, 681, note.
 37. As where there had been a previous quarrel and mutual threats, but the killing was done by surprise, the deceased going his lawful way, and apparently unarmed. Lombard’s case, 681, note. So, under like facts, in Edwards’ case, 682, note.
 38. Such evidence excluded in a case in Kansas, but the facts not stated. Wise’s case, 683, note.
 39. In a case in Kentucky, the facts are not stated, but evidence that the deceased was a man of violent, cruel and blood-thirsty temper and disposition, in the constant habit of carrying concealed weapons, was held proper, but the judgment was reversed on other grounds. Payne’s case, 683, note.
 40. The circumstances under which such evidence will be admitted or excluded, discussed in Dumphey’s case, 684, note.
 41. Such evidence was held properly excluded where there was no evidence that the prisoner *knew* the man he was killing. Reynold’s case, 685, note.
 42. Where the killing was in combat, and self-defence was urged in excuse, “the Court, for the purpose of aiding in the discovery of the character of the homicide, permitted defendant to prove the general character and disposition of the deceased as a quarrelsome, fighting, vindictive and brutal man of great physical strength, rejecting, however, evidence of particular acts of brutality in fighting, etc.” Seibert’s case, 686, note.
 43. Such evidence inadmissible where there is no other evidence tending to show that the killing was in self-defence. Ferrigan’s case, 688, note.
 44. Such evidence held proper in South Carolina, in a case where the facts are not stated; but held—
 1. That there must be evidence making it appear that the defend-

ant *knew*, or may reasonably be supposed to have known, such character.

2. The relevancy of such evidence must appear from the prior evidence in the case; and the Court must necessarily have power to decide, subject to review, upon its relevancy. *Smith's case*, (South Car.), 688, note.

45. Evidence that the deceased was a violent, turbulent, revengeful, blood-thirsty, dangerous man, reckless of human life, held admissible where the killing was deliberately done with a weapon prepared for the occasion; and for two purposes:

1. To be considered by the jury in reducing the *degree* of the crime.

2. To be considered by them in reducing the *quantum* of the punishment. [But, see note criticizing this case.] *Field's case*, (Ala.), 691-695.

46. Where a person is assailed and kills his assailant, it is competent for him to prove on trial for the homicide, that the deceased was a man of high temper and quarrelsome disposition, and *known* by him to be such at the time of the killing; and the exclusion of such evidence in such cases is a serious error. *Hurd's case*, 840, note.

47. The result of the foregoing cases summarized, and the views of the editors stated. 695-696, note.

48. Such evidence admissible—

1. Where the evidence is circumstantial.

2. Where there is evidence tending to show that the killing may have been upon a principle of self-preservation.

3. Where threats have been admitted. 695-6, note.

III. OF A THIRD PERSON.

1. Where a husband is on trial for having made a violent assault upon one who was attempting the seduction of his wife, and the character of the wife for virtue is implicated by the evidence offered for the State, it is competent for the husband to give evidence in support of her general character for chastity. *Biggs' case*, 744.

IV. HOW PROVED.

1. The reasons for excluding such evidence apply with greater force where it is sought to establish it by proof of specific acts. *Wesley's case*, 324.

2. To be established by evidence of general reputation, and not evidence as to general bad conduct. *Keener's case*, 547; *Dupree's case*, 588; *Hudgins' case*, 470, note.

3. Cannot be established by proof of particular facts unconnected with the case. *Wesley's case*, 324; *Dupree's case*, 582, 588; *Bowie v. State*, 19 Ga., 17; *Ben v. State*, 19 Ala., 19; *Seibert's case*, 686, note; *Franklin's case*, 641; *Commonwealth v. Ferrigan*, 688, note; *Rex v.*

Clarke, 2 Stark. R., 243. Contra, Fahnestock's case, 548, note; Tilly's case, 665, note.

4. Evidence of a person living twenty miles from defendant admissible to prove his character, if he knows it. Dupree's case, 588; Bowle v. State, 19 Ga., 17.

COKE, SIR EDWARD.

His statement that a felon may be killed without inevitable cause examined. 231, note.

COOLING TIME.

As to what time will be requisite, after there has been a provocation, such as would reduce a killing to manslaughter, for passion to subside. See Sullivan's case, 70; Hill's case, 199; Jackson's case, 520, note; Hawkins' case, 522, note.

DEADLY WEAPON.

1. Officer assaulted by prisoner may use, if no other weapon be at hand. Forster's case, 143.
2. A person assaulted may repel force by force; but he may not always use a deadly weapon for that purpose, and is still further in the wrong if the weapon is concealed. Stewart's case, 191.
3. It is erroneous to instruct the jury that if the accused was armed with a deadly weapon, and sought and brought about the difficulty with deceased, and killed deceased with such weapon in the difficulty, he is guilty of murder. Cotton's case, 317.
4. Death ensuing from use of, the law presumes intent to take life: malice presumed from use of. Head's case, 341; Hays' case, 510. Contra, Stokes' case, 927.
5. And this although the slayer had been accustomed to carry such weapon—as much so as though he had prepared it for the occasion. Head's case, 341.

DEFENCE.

I. AGAINST FELONIOUS ASSAULTS.

1. A man may repel force by force, in the defence of his person, his family, habitation or property, against one who manifestly intends, by violence or surprise, to commit a known felony upon either. Selfridge's case, 3, 4; Wiltberger's case, 34; Thompson's case, 95; John Kennedy's case, 109; Riley and Stewart's case, 155; Bohannon's case, 403; Carroll's case, 804; Pond's case, 814; Collins' case, 595, note.
2. And if a conflict ensue, in such case, and he take life, the killing is justifiable. Thompson's case, 95; John Kennedy's case, 109; Riley and Stewart's case, 161; Bohannon's case, 403; Carroll's case, 804; Pond's case, 814; Collins' case, 595, note.

3. But no assault will justify killing, unless there be a plain manifestation of a felonious intent. Thompson's case, 95.
4. But it is sufficient, if the intent be apparent though unreal. *Ibid.* Selfridge's case, 18; John Doe's case, 62. And see *APPEARANCES OF DANGER*.
5. Killing in defence against felonious attack lawful, if slayer use all the means in his power to escape. Selfridge's case, 18; John Doe's case, 64; Sullivan's case, 65; Smith's case, 130; Shippey's case, 133. But see Bohannon's case, 395.
6. If the prisoner was going her own lawful way, in a laudable pursuit, and being there assailed with a stick of dangerous character, and thereupon slew her assailant, this was homicide in self-defence. Copeland's case, 57.
7. If she accepted the fight when she might have avoided it by passing on, the provocation being sudden and unexpected, the law would presume the killing to have been upon the fresh provocation, and not upon the ancient grudge, and it would be manslaughter. *Ibid.*
8. But if the deceased hesitated and abandoned her design to assail the prisoner, and left her road unobstructed, and the defendant brought on the attack with the design to slay the deceased, the killing would be murder. *Ibid.*
9. That is—if upon the old grudge, murder in the first degree; if upon malice suddenly excited and without premeditation, murder in the second degree. *Ibid.*, 58.
10. An assault with a knife made under such circumstances of physical incapacity as to preclude a reasonable belief of death or great bodily harm, will not excuse the killing of the assailant. Hinton's case, 89.
11. It is lawful to kill to save one's self from imminent and *great bodily harm*, as well as from death. Benham's case, 133; Burke's case, 126.
12. Killing with deadly weapon to protect one's self from death or serious bodily harm, there being no other weapon, and no means of escape, and retreating as far as he can—justifiable. Smith's case, 130.
13. The law will justify the taking of life, when necessary, to prevent the commission of a felony. Oliver's case, 735.
14. But not to prevent the commission of a mere trespass on the person or property of another. *Ibid.*
15. This rule applied to a killing to prevent the taking away of the defendant's children. *Ibid.*
16. *Duty* of interposing to prevent commission of felonies. 30, note; 159, note; 231, 232, note; 732, note; Pond's case, 814; Dill's case, 738; 750, note 2.
17. No obligation in such case to *retreat* before killing. 30, note; 159, note; 231, 232, note; Pond's case, 814.
18. A well-grounded belief that a felony is about to be committed, will extenuate a homicide committed in prevention, but not in *pursuit*, by an individual of his own accord. Rutherford's case, 733, note; Roane's case, 735, note.

19. Killing to prevent escape, after felony *actually* committed, justifiable. Rutherford's case, 733; Roane's case, 735, note.
20. In either case, the killing must have been *necessary*, to prevent the felony or the escape. Ibid.
21. Summary of the English authorities on the law of justifiable homicide in resistance of felonies. 737, note.
22. Where the felonious act is not of a *forcible* and *violent* character, as in picking pockets, and crimes partaking of fraud rather than force, there is no necessity for taking life, and consequently, no justification, unless possibly, in some exceptional cases. Pond's case, 814; 755, note *b*; 901, note *a*.
23. But life may not properly be taken in resistance of a felony, where the evil may be prevented by other means, within the power of the person who interferes against the felon. Pond's case, 814.
24. No distinction between common law and statutory felonies, with respect to the rule which justifies homicide in preventing their commission. Pond's case, 814; Gray v. Coombs, 887.
25. The rule, as laid down by Sir William Blackstone, that the law will not suffer any crime to be prevented by death, unless the same, if committed, would be punished by death, is misconceived, both as respects the rule itself and the reason of it. In most civilized countries, the authorized extent of resistance in the necessary defence of the person or property, against the perpetration of crimes, must greatly exceed the amount of punishment prescribed by law for their perpetration. Gray v. Coombs, 887.
26. It would seem that the right of killing to prevent the perpetration of crime depends more upon the character of the crime, and the time and manner of its attempted perpetration, than upon the degree of punishment attached to it by law, or upon the fact of its being designated in the penal code as a felony or not. Ibid.

II. AGAINST NON-FELONIOUS ASSAULTS.

1. The use of a deadly weapon in a deadly manner not justified in repelling non-felonious assault. Thompson's case, 95; Wiltberger's case, 88; John Kennedy's case, 109; Drum's case, 186; Stewart's case, 191; Rippy's case, 345.
2. If a person resort to deadly weapons in defending against an ordinary assault, and kill the assailant, it is at least manslaughter. John Kennedy's case, 112; Decklott's case, 112-115, note; Benham's case, 122; Riley and Stewart's case, 163.
3. Killing in defence of ordinary battery not excusable. Drum's case, 186; Oliver's case, 725.
4. Nor where any less injury than death or great bodily harm is feared or indicated by the circumstances. Rippy's case, 345.
5. Nor will every assault justify a battery. Gallagher's case, 720.
6. A party assaulted may strike, or use a sufficient degree of force to prevent the intended blow, without first *retreating*, but he must take

care that he use no more violence than may be necessary to prevent the violence of the assault. Gallagher's case, 720.

7. Degree of resistance against common or non-felonious assaults. 723, note.

III. OF THIRD PERSONS.

See JUSTIFIABLE HOMICIDE.

1. Any person may interfere to prevent a felony. Riley and Stewart's case, 161.
2. The right to interfere to stop a brawl or prevent a felony, declared. Dill's case, 738.
3. Murder to kill one who interferes in such cases. Ibid.
4. The Georgia statute, which punished shooting, done by one person against another, "except in his own defence," expounded. Biggs' case, 744.
5. Right of defence includes the civil and natural relations, such as parent and child, master and servant, etc. 750, note 1; Pond's case, 814.
6. Hence, a man may defend his family, his servants, or his master, wherever he may defend himself. Ibid.
7. Right and duty of a *stranger* to defend another. 750, note 2.
8. Defence of others, where injury threatened is less than a felony. 751, note 3.
9. Degree of homicide where one espouses the quarrel of another and is slain. 751, note 4.
10. Where one brings about a deadly quarrel between two persons, and kills one to save the life of the other, it seems, he is guilty of murder. Mitchell's case, 751, note 5.
11. Whether a person who interferes, and kills one man to prevent him from killing another, will be excused, if he act upon appearances which turn out to be false. 752, note 7; Staten's case, 753-4; Pond's case, 814.
12. Biggs' case, 744, examined, and the right to kill to prevent or punish seduction or other violation of female chastity, considered. 754, note 7.

DEGREE OF FORCE.

In resisting unlawful arrest, see ARREST.

In defending Habitation, PART II, p. 795.

In defending other Property, PART III, p. 863.

1. It is lawful for a person to exert as much force as is necessary to expel a trespasser from a house in which the former lawfully is. *Pennsylvania v. Robertson*.
2. The species of resistance used must have been necessary—or homicide not excused. Thompson's case, 95.

3. A person is not criminally responsible, if death happens to ensue from necessary force used in his defence. *Hinchcliffe's case*, 125, 126. note.
4. Degree of force must not in any case exceed the bounds of defence and prevention. *Gallagher's case*, 720, and note, 723.

DUELLING.

1. Killing in duel is murder. *Hill's case*, 207, 208; *Evans' case*, 340.

DYING DECLARATIONS.

1. It is competent to show that the deceased, after the shooting, and while he believed he was going to die, had an interview with the defendant, at which the shooting was talked over, and then and there acknowledged that he was to blame, and asked defendant to forgive him. *Hurd's case*, 840. Contra, *Adams' case*, 211.

ERROR.

See NEW TRIAL.

1. Supreme Court of Tennessee will weigh testimony and reverse, if it preponderates against verdict. *Copeland's case*, 45.
2. Testimony of wife as to communications of deceased husband, not objected to below, no ground of reversal in Texas. *Hinton's case*, 83.

ESCAPE.

See ARREST.

1. Officer must not kill for, where prisoner is in custody for misdemeanor. *Forster's case*, 143.

EVIDENCE.

See CHARACTER; DYING DECLARATIONS; OPINION OF WITNESSES; THREATS.

1. A witness who swears positively to a given fact, if of good character and sufficient intelligence, may be believed, although twenty swear that they were present and did not see it. *Selfridge's case*, 22.
2. Testimony of widow as to declarations of deceased husband, to show threats, etc., not admissible. *Lingo's case*, 556; *Hinton's case*, 83.
3. But if not objected to below, not ground of reversal. *Hinton's case*, 83.
4. Not error to refuse to allow proof that defendant uttered no hostile expressions, etc. *Lander's case*, 370.
5. Error to refuse to allow a defendant to prove that a person, since dead, had told him that the deceased had armed himself to kill him. *Carico's case*, 389.

8. Declarations of actor made at time of act, always part of *res gestæ*. Monroe's case, 462.
7. When declarations of defendant antecedent to the fact are admissible. *Ibid*.
8. Evidence of nervous sensitiveness not amounting to insanity, not admissible for defendant on trial for homicide. Shoultz' case, 249, note. Contra, Seibert's case, 686, note.
9. As a general rule, it is expedient to receive all the evidence, in a trial for murder, which goes to show the state of feeling of prisoner and deceased toward each other. Monroe's case, 468; Zeller's case, 472; and see Goodrich's case, 532; Murphy v. Dart, 538, note; Riddle v. Brown, 538, note; Keener's case, 539.
10. Hence, error to refuse evidence that defendant had acted as prosecutor against deceased for embezzlement. Monroe's case, 468.
11. Evidence of lawsuits and quarrels between the parties admissible. Zeller's case, 473.
12. Evidence of previous quarrel not admissible for defendant in Louisiana. Jackson's case, 475, note.
13. The question of admitting evidence of previous threats, injuries, etc., in mitigation of the quantum of punishment, in trials for homicide, discussed. Note, 475.
14. The jury instructed to look into the feelings of deceased towards prisoner, as a circumstance making it probable that he might have made the attack, etc. Nelson's case, 491, note; Seibert's case, 686, note.
15. Evidence of previous affrays, attacks, threats, etc., admissible, if there be other evidence showing just cause for alarm; otherwise, if offered merely to show the temper of prosecuting witness toward defendant. Goodrich's case, 533.
16. All the circumstances of a transaction may be admitted in evidence, provided they afford any fair presumption as to the matter in issue. Keener's case, 552.
17. Any circumstances which go to show the character of the attack, the intention with which it was made, and the grounds of fear on which the defendant acted, are admissible. Duke's case, 573, note.
18. A previous difficulty between deceased and a servant of defendant, not admissible. Dupree's case, 582. According with People v. Henderson, 28 Cal., 469; Harmon v. State, 3 Head, 243.
19. Any fact which tends to prove the real motive of the prisoner in killing the deceased, or the purpose of the deceased in going to the prisoner's house, or that the prisoner knew, at the time of the killing, that the deceased and his companions did not intend to commit any felony, nor to do him any great bodily harm, is relevant evidence; as that an affidavit for the arrest of the accused had been sworn out before a justice, and the deceased deputed to execute it. Noles' case, 697. So, evidence tending to show a state of facts, the converse of the above, is admissible in behalf of the accused. Goodrich's case,

532; Monroe's case, 442; Keener's case, 539; Pridgen's case, 416; Campbell's case, 282; Rapp's case, 293; and others.

20. Where one who on the previous night had attempted the violation of the defendant's marriage bed, deliberately took his seat near the wife the next morning at the breakfast table, and the husband thereupon fired a pistol at him, it was held, on trial of the husband for the assault, proper to give in evidence the occurrences of the preceding evening; and it was error to tell the jury that whatever had occurred on the night previous could not amount to a justification or excuse. Biggs' case, 744.
21. On a trial for homicide, where it appeared that the riotous assembly (of which the deceased was one) gathered at the time, grew out of, and was connected with, one which had assembled there the night before, and with the same object,—it was held that all the proceedings and objects of both gatherings, together with the provocation to the defendant, and his acts, constituted together one entire transaction. Patten's case, 826; and see Rector's case, 795; Meade's case, 798.
22. The homicide having resulted directly from said assemblages, and their riotous conduct, it was the right and duty of the prosecution to show the transaction as a whole, its nature and its objects, whether tending to show the guilt or innocence of the defendant. Ibid; and see Maher v. People, 10 Mich., 212; Brown v. People, 17 Mich., 429.
23. Whether the prosecution failed to do so or not, it was the right of the defendant, either by cross-examination or by his own witnesses, to go fully into all matters thus constituting the *res gestæ*, and to show any act or declaration of any one of either assemblage, in furtherance of the common object, or in reference to it, from its inception to its close—the combination once being shown. Ibid.
24. A witness for the prosecution, (one of the rioters,) having testified fully in reference to the proceedings of the first night, and that defendant had confessed to having struck deceased on the second night, denied, on cross-examination, that he had stated to different persons soon after, that he was present as a "horner," but was a mere looker-on, and took no part in the matter whatever. The Court refused to permit the defendant to contradict said testimony. *Held*, that said statements related to the *res gestæ*, and their contradiction was competent. Ibid; and see Goodrich's case, 532.

EXCUSABLE HOMICIDE.

See the various titles in this index.

FELONIOUS ASSAULTS AND ATTEMPTS—RESISTANCE OF.

See DEFENCE.

FEMALE CHASTITY.

1. Killing to prevent or punish violation of. Biggs' case, 744; Staten's case, 753, note; 754, note 7.

FORCIBLE TRESPASS.

See HABITATION, DEFENCE OF.

FOSTER, SIR MICHAEL.

No higher authority on the law of homicide; and by none have the general principles of self-defence been so clearly laid down. John Kennedy's case, 110, DILLON, J.

GENERAL PROPOSITIONS.

1. Danger of accepting, as rules for action. Selfridge's case, 18.
2. Degree of force and means lawful in defence, must depend upon circumstances. John Doe's case, 62.
3. Danger of attempting to lay down intricate rules on subject of homicide in self-defence. Note, 245; Cotton's case, 310; Robert Jackson's case, 476; Patten's case, 826.

GREAT BODILY HARM.

1. Defined. 859, note.
2. A person may lawfully take the life of his assailant, when such killing is reasonably necessary to save himself from *imminent and great bodily harm*. The right of self-defence exists in such cases, the same as it does where the killing becomes necessary to save life. Burke's case, 126; Benham's case, 115.

HABEAS CORPUS.

1. Whether a homicide be justifiable or excusable on the ground of self-defence, or other facts existing at the time, cannot be determined on an enquiry under a writ of *habeas corpus*. McLeod's case, 784.

HABITATION—DEFENCE OF.

1. Expelling trespasser from, with a kick, so that he die, manslaughter. Wild's case, 111, note.
2. Killing mere trespasser in habitation, not excusable. Decklott's case, 112-115, note.
3. Unnecessary killing intruder in, in combat, manslaughter. Robertson's case, 153.
4. Killing in defence against riotous attack upon habitation. Evidence of previous attack and threats. Rector's case, 796; Meade's case, 798; Patten's case, 826.
5. The rule of the common law is, that a man may repel force by force in the defence of his person, *habitation* or property, against one who manifestly endeavors, by violence or surprise, to commit a known felony, such as rape, robbery, arson, burglary, and the like. In these cases, he is not obliged to retreat, but may pursue his adversary

until he finds himself out of all danger. Selfridge's case, 3, 4; Young's case, 402, note; Collins' case, 595, note; note to Stoffer's case, 230, *et seq.*; Carroll's case, 804; Pond's case, 814; Patten's case, 826.

6. *In other cases*, the law requires the use of every precaution consistent with safety, even to flight itself, before taking life; unless, indeed, the party assailed has the protection of his house, which excuses him from retreating further; and this, it seems, is the only difference between assaults upon the *dwelling* and assaults upon the *person*, and that these two classes of assaults, in all other respects, are governed by the same principles. Carroll's case, 804; Pond's case, 814; 861, note 1.
7. The rule as to the extent of protection to the dwelling is, that a mere civil trespass upon a man's house, unaccompanied with such force as to make it a breach of the peace, would not be a provocation which would reduce the killing to manslaughter, if it was done under circumstances from which the law would imply malice, as with a deadly weapon. But in case of trespass with force, it may be murder or manslaughter, according to the circumstances. The owner may resist the entry, but he has no right to kill, unless it be rendered necessary to prevent a felonious destruction of his property, or to defend himself against loss of life or great bodily harm. If he kills when there is not a reasonable ground of apprehension of imminent danger to his person or property, it is manslaughter; and if done with malice, expressed or implied, it is then murder. Carroll's case, 804; Pond's case, 814; Greschia's case, 854; and see note, 861.
8. It is hence said, that it is not every forcible trespass upon a man's dwelling, that will reduce the killing of the trespasser to manslaughter; and that it is not every species of personal violence, even when offered against a man in his own house, that will have this effect. Carroll's case, 804.
9. When the law speaks of a *forcible trespass*, it means such a trespass as amounts to a breach of the peace. Entering a man's house after a warning not to enter, is not, if done without force, a breach of the peace. *Ibid.*
10. Where the assault and breaking of the habitation is *felonious*, the killing, if necessary to prevent it, is *justifiable*. Pond's case, 814.
11. A building thirty six feet distant from a man's house, used for preserving the nets employed in the owner's ordinary occupation of a fisherman, and also as a permanent dormitory for his servants, is in law a part of his dwelling, though not included with the house by a fence; and a homicide, which was necessary to prevent the forcible destruction of such a building, is justifiable. *Ibid.*
12. Where there was a riotous assemblage about the defendant's house, and one of the rioters was killed by the defendant, and there was evidence tending to show that the defendant's mother was in feeble health, it was held that if, from the defendant's knowledge of his

mother's peculiar physical condition, he had reason to believe that her life was endangered by the riotous proceedings, and if the rioters were informed of her condition, or if all reasonable or practicable efforts had been made to notify them of the fact, it was sufficient to excuse his conduct toward them to the same extent, as though the danger to her life had resulted from an actual attack upon her person, or as though in the like danger from an attack upon himself; and he was justifiable in using the same means of protection in the one case as in the other. Patten's case, 826.

13. If the noise and tumult of the rioters prevented defendant giving them notice of the danger to his mother, he was excused from so doing. *Ibid.*
14. The defendant was justifiable in acting for his defence according to the circumstances as they appeared to him; and if from those circumstances, he believed there was imminent danger of death, or great bodily harm to himself or any member of his family, and he had tried all reasonable means which would, under the circumstances, naturally occur to a humane man to repel the attack, he might resort to such forcible means, even with a dangerous weapon, as he believed to be necessary for protection; and if such means resulted in the death of any of the supposed assailants, the homicide would be excusable. *Ibid.*
15. The prisoner and the deceased had an altercation about the alleged ill-treatment by the prisoner, of a boy at the supper table of the prisoner, and the deceased, who was much the larger and apparently the stronger man, seized the prisoner by the lapels of the coat and shook him several times, and threw him on the ground; and the prisoner thereupon went into his house and loaded his pistol, and a few minutes afterwards, came out to where the deceased was at work and requested him to come into the house and ask the women folks whether he had abused the boy; and the deceased threw down his work and ran after the prisoner in a threatening manner, but without any weapon in his hands, and pursued the prisoner into his house, although the prisoner at the threshold commanded him not to enter; and continued the pursuit, until the prisoner had run into a room from which there was no egress, whereupon he turned and shot the deceased, then but four or five feet from him; and, the deceased still advancing, he shot him a second time; of which wounds the deceased died. *Held*, that this was not murder in either degree, but was a case of excusable homicide or manslaughter;—*excusable homicide*, if the jury were satisfied, that the defendant being in his own house, had reason to believe, and did believe, from Hubbard's actions and manner, and what had already taken place, that it was necessary to shoot the assailant to save his own life, or to protect himself from danger of great bodily harm; *manslaughter*, if he did not so believe, but committed the act under a less degree of fear, and the excitement and confusion caused by the first assault, coupled with the then threatened repetition of the attack, and that but for these, he would not have fired the fatal shot. Hurd's case, 840.

16. Not more than half an hour, and probably not more than fifteen minutes, having elapsed between the first and second parts of the transaction, as above stated, it is held, that the whole is to be taken together as one transaction, and as constituting the *res gestæ*. It is not proper to treat them as two distinct transactions, with an interval, for the purpose of raising the question of cooling time.
17. Case of a killing at the door of defendant's habitation, which the deceased was attempting to enter, which was held entirely inexcusable, and that the punishment assessed, to-wit, one year in the penitentiary, was much lighter than the jury would have been warranted in inflicting. *Greschia's case*, 854.
18. It was not erroneous for the Court to instruct the jury, that, in considering whether the killing was in defence of habitation, they should consider the attending circumstances; the conduct of the parties at the time and immediately preceding the killing, and the means and force used, as bearing upon that question. *Ibid*
19. And the jury might properly further consider, in determining whether the killing was in self-defence, whether the force used in repelling the deceased, in its amount and character, was not such as a reasonable mind would regard as unreasonable, under the circumstances. *Ibid*.
20. If the use of a deadly weapon was not necessary, or apparently necessary, in order to prevent the deceased entering the room of the prisoner, and committing, or offering to commit, an assault upon him, and he could reasonably and safely have avoided using the weapon, it was his duty to have done so, even though the deceased was returning to the prisoner's room with a quarrelsome intent. *Ibid*. *Carroll's case*, 804; *Pond's case*, 814.
21. Homicide in defence of habitation under the Illinois statute; instructions held erroneous; great bodily harm. *Reins' case*, 858-9, note.
22. Attack upon habitation a *provocation*, which will reduce a killing to manslaughter; not so a trespass upon other property. 861, note 2.
23. Unlawful breaking of habitation to arrest dweller. 861, note 3.
24. Defence of another's habitation, or of others in one's own habitation. 862, note 4.
25. Degree of force in expelling trespasser from habitation, who has lawfully and peaceably entered. 862, note 5.

HOMICIDE.

See MURDER; MANSLAUGHTER, and the various other titles.

I. PER INFORTUNIAM.

See CAUTION TO BE EXERCISED IN ONE'S DEFENCE.

1. By accidentally discharging a gun in one's defence. *Benham's case*, 124.
2. By throwing a stone at trespassers who invade private property. *Hinchcliffe's case*, 125, 126, note.

3. Statutory provisions of several States and Territories relating to. Note, 125.
4. To kill a third person accidentally, while performing a necessary act of defence. 783-84, note.

II. *SE DEFENDENDO*.

See *DEFENCE*, and the various other titles.

1. To excuse a homicide in self-defence, the act must not be premeditated. *McLeod's case*, 784. Contra, *Bohannon's case*, 395.
2. The doctrine of homicide *se defendendo* at common law, fully stated and discussed in *Pond's case*, 814. See also for a full discussion, *Riley and Stewart's case*, 155.
3. To maintain that a killing was justifiable on the ground of self-defence, it is necessary to show: (1) that the defendant himself was acting in no wise against the law, in the encounter which resulted in the homicide; (2) that at the time of giving the fatal blow, he had reasonable ground to apprehend a design to do him some great personal injury; and (3) that there was imminent danger of such design being accomplished. *Lamb's case*, 646, *SMITH, J.*

HONOR.

1. Killing in defence of, not justifiable. *Selfridge's case*, 24; *Benham's case*, 122.

HUSBAND AND WIFE.

See *EVIDENCE*.

INSTRUCTIONS TO JURY.

See *NEW TRIAL*.

1. Should be given hypothetically; and not assume the existence of a certain state of facts. *Hopkinson's case*, 80.
2. Circumstances under which instructions on the law of self-defence were irrelevant, and calculated to mislead the jury. *Harrison's case*, 71.
3. No evidence raising hypothesis, an instruction on the law of self-defence, though erroneous, is no ground of reversing the judgment. *Shippey's case*, 137; *Shorter's case*, 256.
4. Instruction relating to self-defence which is misleading, when applied to the particular facts of the case, is erroneous. *Benham's case*, 123.
5. Instructing on the weight of evidence. *Wesley's case*, 319; *Gallagher's case*, 726; *Oliver's case*, 725.
6. Where the prisoner prayed for instructions only on the ground that the deceased did intend to kill him, and not on the ground of a reasonable belief on his part, that the deceased did so intend, the Court did not err in omitting to instruct the jury on the latter point. *Scott's case*, 163; *DANIELS, J.*, dissenting.

7. Where a boy sixteen years old shot and killed a man who had attacked him with an ox-gad, the jury should have been told to consider the physical capacity of the parties, the size and character of the ox-gad, and the manner in which the deceased threatened to use it, and in which he entered upon the execution of his threat. Benham's case, 121.
8. Error to instruct the jury, that if they believed A. committed an assault upon B., and was about to commit a battery, that B. was justifiable in striking A. in a particular manner. Gallagher's case, 720.
9. For an instruction on the law of justifiable homicide which assumed the proof of material and essential facts, see James D. Kennedy's case, 137.
10. An instruction which leaves the jury to infer that the danger must have been actual and positive in order to excuse the slayer, is ground of reversal. Campbell's case, 282.
11. The refusal of instructions on the law of self-defence, irrelevant to any hypothesis arising out of the evidence, is no ground for reversing a conviction of murder in the second degree. Stewart's case, 191.
12. It is not error to tell the jury to take into consideration the manner by which, and purposes for which, the prisoner had possession of the knife with which he did the killing. Stewart's case, 198.
13. Nor to refuse an instruction not differing in substance from one already given. Ibid.
14. It is erroneous to add to an instruction which states the law correctly, as to the fears of a reasonable man being a justification for killing, the qualification, "provided the jury believe the defendant used no more force than was necessary," etc. Maher's case, 290.
15. "If a party through mere fear of his life, there being no real or apparent danger, kill another, it is not justifiable." To charge in this language, did not instruct the jury on the weight of evidence. Wesley's case, 327.
16. Where there is any evidence tending to raise a doubt whether the killing was in self-defence or of malice, it is the right of the prisoner to have *all* the law relating to self-defence and applicable to his case, given in charge to the jury. Keener's case, 558.
17. To instruct that the jury may take into consideration all the facts and circumstances surrounding the killing, is equivalent to telling them that they are authorized to consider of antecedent threats made by the deceased against the accused, and communicated to the accused. Johnson's case, 414. .
18. To refuse to instruct on the law of manslaughter, an invasion of the province of the jury, and error. Little's case, 487, 492.
19. An instruction which does not state the *degree* of murder which is to be presumed from a killing with a deadly weapon, is not erroneous, although the presumption would be that of murder in the second degree only. Hays' case, 494.
20. As a general rule, instructions, if proper, should be given in the language requested. People v. Williams, (17 Cal., 146), 604, note.

21. Where a correct instruction is refused on the ground that it has been already given, the jury should be informed of the reason of the refusal. *Ibid.* And see Neeley's case, 96; Lamb's case, 646; and *People v. Williams*, 32 Cal., 28.
22. Whether the taking away and detaining of a man's children is a felony under the Alabama statute, or a trespass merely, depends upon the *intent* with which they are taken; and the question of intent is a question of fact for the jury. Hence, it was erroneous to charge the jury that the taking of the defendant's children, *under the circumstances*, would not have amounted to a felony. *Oliver's case*, 725.

IMMINENCE OF THE DANGER.

See APPEARANCES OF DANGER.

1. To justify homicide, the danger of the accomplishment of a felonious design must be *imminent*. *Wiltberger's case*, 35; *Selfridge's case*, 4.
2. It is not sufficient that the deceased had the means at hand to accomplish a deadly purpose, but he must have indicated by some act or demonstration at the time of the killing, a *present* intention to carry out such design. *Harrison's case*, 71, 74.
3. It must be proved that the assault was imminently perilous. *Thompson's case*, 95; following *Whart. Cr. Law*, §§ 1019, 1020.
4. The killing must take place while the person killed is in the very act of making an unlawful and violent attack, and under such circumstances, that the person assailed cannot resort to other legal means to save and protect himself, except retreating or running, which he is not bound to do. *Isaac's case*, 176. But see *Philip's case*, 383; *Carico's case*, 389; *Bohannon's case*, 395.
5. Although there may have been no actual danger at the very moment of time, the question in such a case is, whether by delay, the danger is not increased. *Cotton's case*, 315.
6. The only general rule which a Court can with any safety lay down on this subject is, that whether the danger must be immediate and unavoidable at the time of the killing to make the killing justifiable self-defence, must depend on the facts and circumstances of each particular case; and of these the jury must be the judges. *Cotton's case*, 315, 316. According with *Robert Jackson's case*, 476; and *Patten's case*, 820.
7. Danger of death or great bodily harm must be imminent, present at the time, real or apparent, and so urgent that there is no reasonable mode of escape, except to take life. When we use the term "apparent"—"apparent danger," we mean such *overt, actual demonstration* as would make the killing apparently necessary to self-preservation. *Evans' case*, 336.
8. The mere apprehension or belief that a person is about to arm himself and return to enter into a combat, does not show present and imminent danger. *Ibid.* 340.

9. Every man may protect his life at whatever hazard ; but the danger must be present, immediate and imminent. Head's case, 341.
10. It must be *apparent* and *imminent*. The circumstances must be such as to authorize the opinion that the deadly purpose *then* exists, and the fear that it will *at that time* be executed. Rippy's case, 345.
11. The killing must have been done under an honest and well founded belief that it was absolutely necessary to kill the deceased *at that moment* to save himself from a like injury. William's case, 349.
12. Where the proof showed that the defendant was, when drunk, a blood-thirsty and reckless bully ; that he entertained a deadly spirit of revenge against the defendant ; that he had made frequent and violent threats against the defendant, which threats continued down to the time of the killing ; that he had, on one occasion, assailed the defendant with a deadly weapon, and driven him out of his house ; that on the day of the killing he had, in various ways, endeavored to provoke a difficulty with the defendant ; that on the day, and at the time of the killing, he was drunk and armed with a six-shooter ; that the defendant knew of his violent animosity towards him, and of the grounds on which it was entertained, and of his desperate character when drunk ; yet, as the proof did not show that the defendant had a reasonable ground for believing that his life was in danger *at the moment* of the killing, a verdict of murder in the second degree was sustained, although the proof showed that the defendant did the killing under an honest and well founded belief that the deceased would kill him in some of his drunken moments. Williams' case, 349.
13. So, no previous threats or demonstrations of whatever character, although the parties cannot long fail to meet, will reduce a killing by lying in wait, from murder in the first to murder in the second degree. Lander's case, 366.
14. Killing is not excused in prevention of a threatened or contingent danger, or a danger in machination only. It must be present and imminent, and there must be no other means of escaping it ; or the slayer must have reasonable grounds to believe that such is the case. Ibid. McLeod's case, 784. Contra, Philips' case, 383 ; Carico's case, 389 ; Bohannon's case, 395.
15. The questions are, was the prisoner in present danger of great bodily harm at the time of the killing ? and was the homicide committed in a *bona fide* attempt to preserve himself from impending danger ? Lander's case, 366 ; Williams' case, 363, 364.
16. State of facts under which it was held erroneous to instruct that the defendant is guilty of murder, unless, when he fired the fatal shot, he had reasonable ground to believe, and did believe, that the deceased was about to carry his threats into execution, etc. Philips' case, 383.
17. It seems that a person who has once escaped from an attempted assassination, and his enemy continues his threats against him, may kill such enemy, wherever he may chance to meet him. Philips' case, 383 ; Carico's case, 389.

18. Under certain circumstances of threats and hostile demonstrations, it was held erroneous to instruct that the defendant was not justified in shooting as and when he did, unless there was *then* imminent danger, etc. The deceased was shot *in the back*, apparently while going to his stable to feed his horse. Carico's case, 389.
19. Fear grounded upon threats, or upon information that one lies in wait, will not justify killing, unless the threats or lyings in wait have been accompanied by an actual attempt to kill, etc., and not then, unless the defendant reasonably believes that the presence of his enemy puts his life in continual peril, and that he can escape it in no other way. Bohannon's case, 395.
20. Erroneous to instruct that the defendant cannot be acquitted on account of any real or apparent danger not existing, etc., and not *about then to fall upon him at the time of the killing*. Ibid.
21. What constitutes such an *overt act* as will warrant a person in striking in his defence, a question for jury. Robert Jackson's case, 483.
22. It is not error to refuse to charge the usual doctrine in regard to the right to act upon appearances of danger which may not be real, except with the qualification that the danger must be be imminent or threatening. Dupree's case, 583.
23. What degree of danger will excuse a homicide, discussed in Tackett's case, 615.
24. The apprehension of danger which will justify a homicide must exist *at the time* the homicide is committed. Lamb's case, 646, DAVIES, Ch. J.; Rippy's case, 345.
25. Imminence of the danger in case of common or non-felonious assaults. 723, note.
26. The right of using violence in self-defence only arises where one is forcibly assailed. McLeod's case, 786.
27. The right of resorting to force upon the principle of self-defence does not arise while the apprehended mischief exists in machination only; nor does it continue so as to authorize violence by way of retaliation or revenge for a past injury. Ibid. According with Lander's case, 366.
28. A force which a party has a right to resist must itself be within striking distance; it must be menacing, and apparently able to inflict physical injury, unless prevented by the resistance which he opposes. McLeod's case, 784; Rippy's case, 345; Williams' case, 349; Wesley's case, 319; Dyson's case, 304; Scott's case, 163; Hinton's case, 83; Harrison's case, 71. Contra, Philips' case, 383; Carico's case, 389; Bohannon's case, 395. And see Robert Jackson's case, 482; Cotton's case, 316; Patten's case, 826.
29. The foregoing rules, limiting the right of defence, apply to a state of *mixed*, or of *private war*. We may in such cases resist and repel the foreigner at the instant when he comes violently upon us. But we cannot, without the sovereign's command, either assault him whilst his mischief is only in machination, or revenge ourselves upon him after he hath performed the injury against us. McLeod's case, 784.

INJURING THIRD PERSON IN ONE'S DEFENCE.

1. A person who, in his lawful defence, fires a pistol at his antagonist, and accidentally wounds a by-stander, is not liable in damages for the injury, if guilty of no negligence. *Morris v. Platt*, 768 ; 783, note.

JURY.

See INSTRUCTIONS.

1. To determine under what circumstances the assault was made. *Hopkinson's case*, 80.
2. Or under what circumstances an assaulted party may strike, and the degree of force he may use. *Gallagher's case*, 720.
3. To ascertain the facts ; Court to declare the law. These functions distinct and independent. *Selfridge's case*, 19.
4. In Illinois, are judges of law as well as of fact. *Adams' case*, 208.
5. So in Georgia ; and they are entitled to the *assistance* of the Court. *Keener's case*, 563.
6. Whether the appearances of danger were sufficient to justify the means of defence used, is a question for the jury. *Selfridge's case*, 1 ; *Harris' case*, 276 ; *Cotton's case*, 310 ; *Oliver's case*, 725 ; *McLeod's case*, 784.
7. Whether previous threats, taken in connection with the facts surrounding the killing, are sufficient to justify the killing, is a question of fact for the jury ; and the judge cannot determine this fact as a question of law, by ruling that the facts immediately surrounding the killing do not afford a sufficient predicate for the introduction of evidence of threats. *Pridgen's case*, 416 ; *Robert Jackson's case*, 476. *Contra*, *Myer's case*, 432 ; *Hays' case*, 492.
8. It would be error for the Court to instruct the jury, that, if they believed that A. committed an assault upon B., and was about to commit a battery, that B. was justifiable in striking A. in a particular manner. *Gallagher's case*, 720.
9. Jury not permitted to take code into consultation room. *Keener's case*, 559, and cases cited ; *Selfridge's case*, 24 ; *State v. Patterson*, 12 Am. Law Reg., 647.

JUSTIFIABLE HOMICIDE.

See also the various titles of this Index.

1. Killing felonious assailant is. *Selfridge's case*, 3, 4 *Riley and Stewart's case*, 155 ; *Monroe's case*, 442 ; *Pond's case*, 814.
2. Killing in advancement of public justice is. *Selfridge's case*, 16 ; *Pond's case*, 814 ; and other cases.
3. Distinction between justifiable and excusable homicide. *Selfridge's case*, 16, and note ; *Riley and Stewart's case*, 155 ; *Pond's case*, 814.
4. Under the Illinois statute, defined. *Hopkinson's case*, 80.

6. Declarations of actor made at time of act, always part of *res gestæ*. Monroe's case, 462.
7. When declarations of defendant antecedent to the fact are admissible. *Ibid*.
8. Evidence of nervous sensitiveness not amounting to insanity, not admissible for defendant on trial for homicide. Shoultz' case, 249, note. Contra, Seibert's case, 696, note.
9. As a general rule, it is expedient to receive all the evidence, in a trial for murder, which goes to show the state of feeling of prisoner and deceased toward each other. Monroe's case, 468; Zeller's case, 473; and see Goodrich's case, 532; Murphy v. Dart, 538, note; Riddle v. Brown, 538, note; Keener's case, 539.
10. Hence, error to refuse evidence that defendant had acted as prosecutor against deceased for embezzlement. Monroe's case, 468.
11. Evidence of lawsuits and quarrels between the parties admissible. Zeller's case, 473.
12. Evidence of previous quarrel not admissible for defendant in Louisiana. Jackson's case, 475, note.
13. The question of admitting evidence of previous threats, injuries, etc., in mitigation of the quantum of punishment, in trials for homicide, discussed. Note, 475.
14. The jury instructed to look into the feelings of deceased towards prisoner, as a circumstance making it probable that he might have made the attack, etc. Nelson's case, 491, note; Seibert's case, 696, note.
15. Evidence of previous affrays, attacks, threats, etc., admissible, if there be other evidence showing just cause for alarm; otherwise, if offered merely to show the temper of prosecuting witness toward defendant. Goodrich's case, 533.
16. All the circumstances of a transaction may be admitted in evidence, provided they afford any fair presumption as to the matter in issue. Keener's case, 552.
17. Any circumstances which go to show the character of the attack, the intention with which it was made, and the grounds of fear on which the defendant acted, are admissible. Duke's case, 573, note.
18. A previous difficulty between deceased and a servant of defendant, not admissible. Dupree's case, 582. According with People v. Henderson, 28 Cal., 469; Harmon v. State, 3 Head, 243.
19. Any fact which tends to prove the real motive of the prisoner in killing the deceased, or the purpose of the deceased in going to the prisoner's house, or that the prisoner knew, at the time of the killing, that the deceased and his companions did not intend to commit any felony, nor to do him any great bodily harm, is relevant evidence; as that an affidavit for the arrest of the accused had been sworn out before a justice, and the deceased deputed to execute it. Noles' case, 697. So, evidence tending to show a state of facts, the converse of the above, is admissible in behalf of the accused. Goodrich's case,

532; Monroe's case, 442; Keener's case, 539; Pridgen's case, 416; Campbell's case, 282; Rapp's case, 293; and others.

20. Where one who on the previous night had attempted the violation of the defendant's marriage bed, deliberately took his seat near the wife the next morning at the breakfast table, and the husband thereupon fired a pistol at him, it was held, on trial of the husband for the assault, proper to give in evidence the occurrences of the preceding evening; and it was error to tell the jury that whatever had occurred on the night previous could not amount to a justification or excuse. Biggs' case, 744.
21. On a trial for homicide, where it appeared that the riotous assembly (of which the deceased was one) gathered at the time, grew out of, and was connected with, one which had assembled there the night before, and with the same object,—it was held that all the proceedings and objects of both gatherings, together with the provocation to the defendant, and his acts, constituted together one entire transaction. Patten's case, 826; and see Rector's case, 795; Meade's case, 798.
22. The homicide having resulted directly from said assemblages, and their riotous conduct, it was the right and duty of the prosecution to show the transaction as a whole, its nature and its objects, whether tending to show the guilt or innocence of the defendant. Ibid; and see Maher v. People, 10 Mich., 212; Brown v. People, 17 Mich., 429.
23. Whether the prosecution failed to do so or not, it was the right of the defendant, either by cross-examination or by his own witnesses, to go fully into all matters thus constituting the *res gesta*, and to show any act or declaration of any one of either assemblage, in furtherance of the common object, or in reference to it, from its inception to its close—the combination once being shown. Ibid.
24. A witness for the prosecution, (one of the rioters,) having testified fully in reference to the proceedings of the first night, and that defendant had confessed to having struck deceased on the second night, denied, on cross-examination, that he had stated to different persons soon after, that he was present as a "horner," but was a mere looker-on, and took no part in the matter whatever. The Court refused to permit the defendant to contradict said testimony. Held, that said statements related to the *res gesta*, and their contradiction was competent. Ibid; and see Goodrich's case, 532.

EXCUSABLE HOMICIDE.

See the various titles in this index.

FELONIOUS ASSAULTS AND ATTEMPTS—RESISTANCE OF.

See DEFENCE.

FEMALE CHASTITY.

1. Killing to prevent or punish violation of. Biggs' case, 744; Staten's case, 753, note; 754, note 7.

15. For an officer to kill his prisoner in an affray between them, where there are mutual blows in heat. Forster's case, 143.
16. For a person of superior strength to kill his adversary with a heavy club in combat, and although pressed to the wall. Wells' case, 151.
17. To kill an antagonist with a deadly weapon in combat, the slayer's life not being in danger, and he having no reason to fear great bodily harm. Riley and Stewart's case, 163.
18. To kill with a weapon not prepared for the occasion, upon an impulse of passion produced by blows inflicted, although at the instant there was a design to kill. Drum's case, 190, 191.
19. To kill an assailant who intends to commit a trespass upon the person merely. Monroe's case, 442.
20. To slay one taken in the act of adultery with the slayer's wife. 755, note c.
21. To attack another, and, the attack being returned with a violence disproportioned to the original assault, to kill him under the transport of passion thus excited. Hill's case, 205.
22. To enter voluntarily into a fight not intending to kill, and without first declining further combat, killing antagonist with deadly weapon. Adams' case, 208.
23. The passion which will reduce a killing to manslaughter need not amount to a dethronement of reason; it is sufficient if there be great passion produced by adequate provocation, although the act done may have been intentional of death. Hill's case, 205, 206.
24. The enquiry to be submitted to the jury is, whether sufficient time had elapsed for the blood to cool. Ibid, 206.
25. Words of reproach, contemptuous gestures, etc., will be not reduce a killing with deadly weapons to manslaughter. Ibid.
26. But this rule does not obtain where, because of sufficient provocation, the parties become suddenly heated and engage immediately in mortal combat, fighting on equal terms. Ibid.

MASTER OF VESSEL.

1. Cannot justify homicide of seaman by evidence of mutinous combination unknown to him at the time. Wiltberger's case, 39.
2. Not obliged to retreat before he can justify killing seaman. Ibid.

MAXIMS.

Actus non facit reum, nisi mens sit rea. Note, 252, 253.

MISPRISION OF FELONY.

To suffer a felony to be committed without resisting. 30, note - 750, note 2.

"not to shoot; he was unarmed:" evidence of the character of the man shot, for danger and desperation, was held properly excluded. Jackson's case, (Mo.), 679, note.

33. In a later case of homicide in Missouri, where there had been bitter hostility between the parties, and both were armed at the time of the killing, evidence that the deceased was a turbulent, violent and dangerous man, was admitted, and it was held error to refuse to instruct the jury as to the weight of such evidence. Hicks' case, 680, note.
34. And ruled in the same case, that the rash, turbulent and violent disposition of the deceased, if known to the defendant, is a circumstance to be considered by the jury in estimating the reasonable cause for defendant's apprehension. Ibid.
35. And ruled in a later case in the same State, that such evidence ought to be admitted, where it is doubtful whether the killing was done maliciously, or upon a well grounded apprehension of danger. Keene's case, 681, note.
36. Such evidence will not be admitted unless the circumstances raise a doubt as to whether the killing was in self-defence. Murray's case, 681, note.
37. As where there had been a previous quarrel and mutual threats, but the killing was done by surprise, the deceased going his lawful way, and apparently unarmed. Lombard's case, 681, note. So, under like facts, in Edwards' case, 682, note.
38. Such evidence excluded in a case in Kansas, but the facts not stated. Wise's case, 683, note.
39. In a case in Kentucky, the facts are not stated, but evidence that the deceased was a man of violent, cruel and blood-thirsty temper and disposition, in the constant habit of carrying concealed weapons, was held proper, but the judgment was reversed on other grounds. Payne's case, 683, note.
40. The circumstances under which such evidence will be admitted or excluded, discussed in Dumphrey's case, 684, note.
41. Such evidence was held properly excluded where there was no evidence that the prisoner knew the man he was killing. Reynold's case, 685, note.
42. Where the killing was in combat, and self-defence was urged in excuse, "the Court, for the purpose of aiding in the discovery of the character of the homicide, permitted defendant to prove the general character and disposition of the deceased as a quarrelsome, fighting, vindictive and brutal man of great physical strength, rejecting, however, evidence of particular acts of brutality in fighting, etc." Seibert's case, 686, note.
43. Such evidence inadmissible where there is no other evidence tending to show that the killing was in self-defence. Ferrigan's case, 688, note.
44. Such evidence held proper in South Carolina, in a case where the facts are not stated; but held—
 1. That there must be evidence making it appear that the defend-

20. To kill one who interferes to prevent felony. Dill's case, 738.
21. To kill one because he has committed adultery with wife. 755, note, c, d.
22. To constitute murder, the killing must be *unlawful*, as well as pre-determined. Bohannon's case, 395. See McLeod's case, 784.
23. Intentional killing not necessarily murder. Lander's case, 366.
24. The slayer having provoked the slain to strike him with a stick, was not justified in retreating out of danger, drawing a dagger, returning to the conflict, and with it killing his antagonist. Isaac's case, 176.

MUTUAL COMBAT.

1. Defined. Tate's case, 230, note; Stoffer's case, 218; United States v. Mingo, 2 Curt. C. C., 1.
2. If a person of superior strength is pressed to the wall in combat, and thereupon seizes a dangerous weapon and with it kills his antagonist, this is manslaughter and not excusable homicide. Wells' case, 145.
3. The killing of an Indian with a door-bar, in combat, no other means of escaping his rage, self-defence. Robertson's case, 152.
4. Killing in combat, through necessity, after retreating to the wall, excusable, but borders on manslaughter. Riley and Stewart's case, 161.
5. In combat without weapons, if one combatant kills the other with a deadly weapon secreted on his person, this is murder. Scott's case, 163.
6. A conflict is the work of two persons; and when one succeeds in withdrawing from it, it is ended; and if the other pursues, he assumes the attitude of an attacking party. Stoffer's case, 213.

NECESSITY.

1. Homicide justified or excused on the ground of necessity merely. State v. Wells, 145; Pennsylvania v. Robertson, 152; Shippey's case, 133; Wiltberger's case, 35; John Doe's case, 62; John Kennedy's case, 110; Benham's case, 122; Wells' case, 151; Robertson's case, 152; Isaac's case, 175; Hill's case, 204; and others.
2. Necessity of killing must be apparent, as the only means of avoiding the slayer's own destruction, or some very great injury. State v. Wells, 145.
3. The means used to prevent an impending injury must be only such as are necessary under the circumstances. Hinton's case, 87, 88; Thompson's case, 95.
4. There can be no successful setting up of self-defence, unless the necessity for taking life was actual, present, urgent—the only reasonable resort of the party to save his own life, or his person from dreadful harm, or severe calamity, felonious in its nature. Benham's case, 122.

5. To justify an act, as in self-defence, there must be at least an *apparent necessity* to ward off by force some bodily harm. Shippey's case, 137.
6. The right of attack for the purpose of defence does not arise until he has done everything in his power to avoid its necessity. Sullivan's case, 65; Shippey's case, 136.
7. But not where his life is sought by a desperate and persevering enemy who has already attempted his assassination. Bohannon's case, 395.
8. There must be no other possible, or at least probable, means of escaping the necessity. Drum's case, 183; Shippey's case, 136.
9. The necessity must be great, and must arise from imminent peril of death or great bodily injury. Drum's case, 186.
10. Necessity, the true criterion. Ibid, 187.

NERVOUS FEARS.

1. No excuse for homicide. See Grainger's case, 238, and note; Shorter's case, 256.
2. Not sufficient to show that the defendant was in actual fear; there must have been a reasonable cause for such fear. Creek's case, 253.
3. Evidence of debility and nervous excitability not admissible on behalf of prisoner. Shoultz' case, 249. Contra, Flavel's case, Whart. Cr. Law, § 1037.
4. Views of Dr. Wharton as to whether the jury are to judge from the standpoint of their own capacity, or from that of the prisoner. Note, 249, 251-253.
5. Timidity of disposition of prisoner may be looked to in determining whether he ought to be excused in using the degree of force he did. Seibert's case, 686, note.
6. The criminal law, while indulging to a humane extent the infirmities of human nature, yet nevertheless requires of sane men the exercise of a mastery over their fears, as well as their passions. Creek's case, 253.

NEW TRIAL.

1. In criminal cases, if justice has been done, and if the result of another trial ought to be the same as the first, and the revising court are decidedly of this opinion, a new trial will not be granted, although the judge may have directed the jury improperly, or may have rejected evidence which, strictly speaking, ought to have been admitted. Wells' case, 151.
2. The Supreme Court of Pennsylvania will award a new trial for manifest error in instructing the jury on a given point in a criminal case, without stopping to enquire whether the right result has been reached by the verdict. Logue's case, 275.
3. In criminal cases, the Supreme Court of Tennessee will weigh the testimony, and if it preponderates against the verdict, they will grant a

new trial. And a conviction of murder in the second degree in this case is reversed, upon an examination of the proof adduced. Cope-land's case, 41.

4. The Supreme Court of Mississippi will not, in a capital case, reverse because of an instruction on the weight of evidence, where the fact assumed as proven was so clearly established that there could be no room to doubt. Weasley's case, 328.
5. It is only after an examination of the whole record, and when it appears that the party complaining has either been injured, or may have been injured by an erroneous instruction, that that Court will interpose and correct the error. Ibid.
6. The denial of any legal right in a criminal case, is sufficient to reverse a judgment. Pridgen's case, 484.
7. Case where a conviction of murder in the second degree was reversed on the facts. Underwood's case, 441, note.

OCCASION PRODUCED BY SLAYER, NO DEFENCE.

1. A real or apparent necessity brought about by the design, contrivance, or fault of the slayer is no excuse. Rippey's case, 345.
2. He who provokes a quarrel, and, being therein overmatched, kills his adversary to save himself from apparent danger, is guilty of manslaughter, if not of murder. Selfridge's case, 24.
3. But it seems that no words nor libellous publication, however aggravating, will prejudice one's right of defence, if attacked in consequence thereof. Ibid, 25, 26.
4. Where one is assailed, and strikes the assailant in his necessary, or apparently necessary defence, and is thereupon slain, such striking does not constitute a provocation such as will reduce the killing to manslaughter. Baker's case, 75.
5. So, if he draw a pistol in his necessary defence, the danger thus occasioned will not excuse the original assailant in killing him. Hays' case, 492.
6. Nor will it, if he fires a pistol. Lingo v. State, 515, note.
7. So, a person who puts himself in the wrong by refusing to go out of another's house when commanded to do so, is bound to submit to as much force as is necessary to put him out; and if, while such necessary and reasonable force is being applied to him, he turns and kills the owner with a deadly weapon, it is murder, and not self-defence. Hinton's case, 89.
8. In such case his right of resistance would not be called into existence at all, unless the owner used or was in the act of using, or was manifestly about using more force than was necessary to put him out; and then he would have the right to resist, but only to the extent and by the use of the means necessary to repel such excessive force, so used or impending. Ibid.

9. See to the same effect, *Rex v. Willoughby*, note, 90; *Lyon v. State*, 91. And upon the principle that the exercise of a legal right can never be deemed a provocation, such as will mitigate an act of violence, see *State v. Lawry*, 90, note, and *Lingo v. State*, 515, note.
10. A person who seeks another with a loaded gun for the purpose of having an affray, cannot excuse the slaying of his adversary on the ground that the latter fired the first shot. *Neeley's case*, 102; *Benham's case*, 115.
11. A person cannot get the benefit of the plea of self-defence, if he sought the deceased with a view to provoke a difficulty or bring on a quarrel. *Benham's case*, 122; *Adams' case*, 208; *Linney's case*, 221, 222, note; *Stonecipher's case*, 222, note; *Vaiden's case*, 223, note; *Roach's case*, 224, note; *Chambers v. Porter*, 5 Coldw., 273; *Lingo's case*, 515, note.
12. The occasion must not have been *provoked* or *sought* by the slayer; and (in Texas) must have been avoided, if possible, by any means *except retreating*. *Isaac's case*, 175.
13. To seek and provoke an attack upon one's self with the design of killing the assailant, and, being assaulted with fists only, killing him with deadly weapon, is murder, and not self-defence. *Stewart's case*, 191.
14. If a man strike another with malice prepense, even though he should be driven to the wall, and then kill his adversary, he is yet guilty of murder in respect of the first intent. *Hill's case*, 203. Contra, *Stoffer's case*, 213.
15. He who commences a malicious assault cannot justify killing his adversary while he continues in the combat. *Stoffer's case*, 213.
16. Otherwise after he has succeeded in withdrawing from the place and retreating to the wall. *Ibid*.
17. How far a man parts with his right of defence by seeking or provoking an affray, considered in a note to *Stoffer's case*, 220, *et seq*.
18. Restoration of right of perfect defence by withdrawing from combat and retreating. Note, 227, *et seq*.
19. To make the plea of self-defence available, the defendant must be without fault. *Shorter's case*, 258; *SMITH, J.*, in *Lamb's case*, 646.
20. The right of attack for the purpose of defence, does not arise until the party claiming such right has done everything in his power to avoid its necessity. *SMITH, J.*, in *Lamb's case*, 646; *Sullivan's case*, 65; *Shippey's case*, 186. Contra, under certain circumstances, *Bohannon's case*, 395.
21. But seeking difficulty, being armed with deadly weapon, does not necessarily make a killing in the combat with such weapon, murder. *Cotton's case*, 317.
22. If the defendant provoked the attack intending to kill the assailed, the killing of the assailed will be murder in the first degree, although the assailed had drawn a pistol at the time he was killed. *Hays' case*, 403.

23. A person who kills to save himself from death or great personal injury will not be excused, if he provoked the difficulty and brought upon himself the danger. Hays' case, 494.

OFFICER.

See ESCAPE.

1. Killing prisoner by. Forster's case, 143.

OLD GRUDGE.

1. Where there is a fresh provocation, a killing will not be ascribed to an old grudge; and will therefore be manslaughter, and not murder. Copeland's case, 57; Baker's case, 78; Hill's case, 203; Williams' case, 249.

OPINIONS OF WITNESSES.

1. Defendant's justification must depend upon *facts* and not *opinions* of witnesses. Hudgen's case, 471, note; Hawkins' case, 471, note. This is the general rule. Keener's case, 539, 542.
2. Not competent to prove that at the time of the killing, the witness said to the deceased, "Yonder comes John Anderson, and he will kill you." Hudgins' case, 471.
3. Not admissible to ask, "Whether the tone of voice, with the language and manner of deceased, were not such as to cause you to look for a difficulty?" Keener's case, 542.

PRACTICE.

1. The duty of the prosecution in criminal cases to present all the attainable evidence of the transaction stated and discussed. Hurd's case, 842; and see Barfield's case, 624, and note e.

PROPERTY, DEFENCE OF.

[This title refers to defence of property *other than the habitation*.]

I. GENERALLY.

1. Owner not obliged to surrender possession, but may use as much force as necessary for its protection. Payne's case, 863; 900, note 1.
2. Where a trespasser goes with the intent and with the means to commit a felony, if necessary to accomplish the end intended, the owner of the property may repel force by force, to the extent of killing the aggressor. Ibid.
3. Where an armed trespasser goes to the place where the property of another is deposited, and, under a claim of right, attempts to remove it by force, and manifestly intends to kill the owner of the property

if necessary to accomplish his purpose, and the owner shoots and kills such trespasser, this is excusable self-defence. *Ibid.*

4. Perfect right to defend property stops at limit where it becomes necessary to take life. 901, note 2.
5. The right limited to the prevention of *forcible* and atrocious felonies. 901, note 2, a.
6. A killing to prevent a mere *trespass* upon property is unlawful and felonious. 902, note b.
7. Killing to prevent bare trespass, murder and not manslaughter. 902, note c.
8. Unless the trespass involve an attack upon, or combat with, the owner. 903, note c, clause 2.

II. BY SPRING-GUNS, POISON, ETC.

9. In a civil action, lawfulness of protecting private property by spring guns to be determined by the whole law, whether as appearing in the civil or in the penal code. *Gray v. Coombs*, 867.
10. Where a person has valuable property in a strong warehouse, well secured by locks and doors, it is lawful for him, as an additional security *at night*, to erect a spring-gun which can only be made to explode by entering the house. *Ibid.*
11. Unlawful to lay poison for trespassing fowls. *Johnson v. Patterson*, 878.
12. What *notice* in such cases is to be deemed sufficient. *Ibid.*
13. The right of an owner to defend his property in his absence, by means of engines or poisons placed so as to kill or injure trespassing men or animals, discussed at length upon principle and in view of the English authorities; and it is held, that no such right exists in Connecticut. *Ibid.*
14. The doctrine of this case is limited to cases of trespass merely. What may be done to prevent a *burglary* or other *felony*, is admitted to be governed by other rules. *Ibid.*
15. The case of *Hott v. Wilkes*, 8 Barn. & Ald., 304, criticised and disparaged; and the grounds of public policy adduced in support of the rule adjudged in that and other similar English cases, declared to have no force or application in Connecticut. *Ibid.*
16. The mere act of setting spring-guns on one's own premises for their protection is not unlawful in itself, but the person doing it may be responsible for injuries caused thereby to individuals, and may be indictable for the erection of a nuisance, if the public are subjected by it to any danger. *State v. Moore*, 891.
17. What a man may not do directly, he may not do indirectly. A man may not, therefore, place instruments of destruction for the protection of his property where he would not be authorized to take life with his own hand for its protection. *Ibid*; *Johnson v. Patterson*, 878; and see *Gray v. Coombs*, 867.

18. The right to take life in defence of property, as well as of person and habitation, is a natural right; but the law limits its exercise to the prevention of forcible and atrocious crimes, of which burglary is one. *State v. Moore*, 891; *Gray v. Coombs*, 867; *Pond's case*, 814; *Oliver's case*, 725; 732, note.
19. In the absence of any statutory provision making it burglary to break and enter a shop in the night-time with intent to steal, and by the early strict rules of the common law, a man may not take life in the prevention of such a crime. *State v. Moore*, 891.
20. The habits of the people and other circumstances have, however, so greatly changed since the ancient rule was established, that it is very questionable whether, in view of the large amount of property now kept in warehouses, banks, and other out-buildings, it should not be held lawful to place instruments of destruction for the protection of such property. *Ibid*; *Gray v. Coombs*, 867.
21. Breaking and entering a shop in the night-season with intent to steal, is by the law of Connecticut, burglary; and the placing of spring-guns in such a shop for its defence would be justified if the burglar should be killed by them. *State v. Moore*, 891.
22. The guns would, however, constitute a nuisance, if they cause actual danger to passers-by in the street; but the danger to the public must be of a real and substantial nature. *Ibid*.
23. And held in this case, upon a special verdict, that the guns were so set as not to constitute a nuisance. *Ibid*.
24. The English cases relating to defence of property by spring-guns, etc., reviewed. 903-904, note 3.

PURSUIT.

See RETREAT.

1. Right to pursue felonious assailant declared. *Selfridge's case*, 4.
2. Under what circumstances the right to pursue exists, and how long it continues. Note, 230 *et seq*.
3. Killing in pursuit after felonious assault. *Redding Evans' case*, 233, note.
4. Same where the retreat is merely to gain fresh advantage; running fight. *Hodge's case*, 234, note.
5. Killing pursuer by the original assailant, in like case. *Stoffer's case*, 213.
6. If a person who has been feloniously assailed has reason to believe, and does actually believe, that he is in continual danger of a renewal of the assault, he may pursue his enemy until he may reasonably believe himself secure from all danger. *Young's case*, 401, note.

REASONABLE BELIEF.

See APPEARANCES.

REASONABLE DOUBT.

See BURDEN AND QUANTUM OF PROOF.

1. Defined. Drum's case, 189, 190.

RETREAT.

1. Not always a condition which precedes the right to kill in self-defence. Creek's case, 253.
2. A person feloniously assailed need not. Selfridge's case, 4.
3. A person feloniously assailed must, before killing, unless retreat would increase danger. Selfridge's case, 17, 18; John Doe's case, 64; Benham's case, 121; Smith's case, 130.
4. Whether he can escape is "the real stress of the case." Ibid, 24.
5. If the combatants are without weapons, and one is pressed to the wall, so that further retreat is impossible, he will not be justified in seizing a dangerous weapon, and with it killing his antagonist; but it is manslaughter. Wells' case, 145.
6. The doctrine examined at length in a note to Selfridge's case, 28 *et seq.*, and in a note to James D. Kennedy's case, 139 *et seq.*
7. Master of vessel not obliged to retreat, in order to justify killing seaman. Wiltberger's case, 40.
8. Copeland's case, 41, and Selfridge's case, 1, compared, with reference to the doctrine of retreating before killing. Note, 62.
9. Right to slay in defence does not arise until slayer has done everything in his power to avoid the necessity. Sullivan's case, 65; Shippey's case, 133. Contra, Bohannon's case, 395.
10. Retreat not required where assault is with deadly weapon. Thompson's case, 95; John Kennedy's case, 109; Tweedy's case, 905.
11. Or where assault is so fierce that assailed cannot yield without manifest danger of death or enormous bodily harm. Selfridge's case, 17, 18; John Doe's case, 64; Thompson's case, 95; John Kennedy's case, 109; Benham's case, 121; Pond's case, 814.
12. Or where the assailant has made murderous threats, and his demonstrations indicate a design to carry them into execution. James D. Kennedy's case, 139.
13. But in all cases of *mutual conflict*, the slayer must decline further combat and retreat as far as he can with safety, before the law will excuse the killing of his adversary. John Kennedy's case, 110; Robertson's case, 152; Riley and Stewart's case, 161.
14. Not necessary in Texas to retreat in any case, in order to justify killing on the ground of self-defence. Isaac's case, 175, and note.
15. Every citizen may rightfully traverse the street, or may stand in all proper places, and need not flee from every one who chooses to assail him; but the law does not apply this right to homicide. The question here does not involve the right of merely ordinary defence, or the right to stand wherever he may rightfully be, but it concerns the right of one man to take the life of another. When it comes to

a question whether one man shall flee or another shall live, the law decides that the former shall rather flee than that the latter shall die. Drum's case, 188, 189.

16. He who brings on attack is bound to retreat before killing. Hill's case, 201, 203.
17. A person assaulted in the first instance, if a combat ensues, cannot excuse a killing as in self-defence without retreating, if he safely can. Hill's case, 204. At least, if the original assault was *non-felonious* in its character. Pond's case, 814.
18. A person who first makes a malicious assault restores his full right of defence by withdrawing from the combat and retreating as far as he can. Stoffer's case, 213; Hittner's case, 236.
19. Instructions to the jury should be so framed as to give the prisoner the benefit of any supposed retreat. Hittner's case, 236.
20. It is erroneous to tell the jury that the defendant is not excusable if he had any safe means of escaping, etc.; because the question is not whether he might have safely escaped, but whether the appearances were such as to convince a reasonable man that he might have safely escaped. Meredith's case, 298.
21. Not necessary to retreat, unless, *in the judgment of a reasonable man*, it may be safely done. Meredith's case, 301.
22. A person who has once escaped from an attempted assassination, and whose enemy continues his threats against him, is not obliged to run or shun his enemy. Phillips' case, 383; Bohannon's case, 395.
23. But whether he may hunt him to kill him is not intimated. Phillips' case, 383.
24. It seems that he may. Carico's case, 389. Contra, Bohannon's case, 395.
25. It is hence error to instruct that the right of self-defence does not arise until the defendant has done everything in his power to avoid the necessity. Bohannon's case, 395. Contra, Sullivan's case, 65; Shippey's case, 133.
26. Homicide *se defendendo* is *excusable* at common law, when it occurs in a sudden affray, or in repelling an assault not made with a felonious design. In these cases, the original assault not being with a felonious intent, and the danger arising in the heat of blood on one or both sides, the homicide is not excused, unless the slayer does all which is reasonably in his power to avoid the necessity of extreme resistance, by retreating where retreat is safe, or by any other expedient which is attainable. He is bound, if possible, to get out of his adversary's way, and he has no right to stand up and resist, if he can safely retreat or escape. He must retreat as far as he can; and when, by reason of intervening impediments or the fierceness of the assault, he can retreat no further without manifest danger of death or great bodily harm, he may turn and kill his assailant; and if he can make it appear to the jury that the killing was *necessary* to protect his own life, or to protect himself from serious bodily harm, and that he did all he could to avoid it, he will be justified. Pond's case, 814.

27. A man is not, however, obliged to retreat if assailed *in his dwelling*, but may use such means as are absolutely necessary to repel the assailant from his house or to prevent his forcible entry, even to the taking of life. But here, as in other cases, he must not take life if he can otherwise repel the assailant. Pond's case, 814; Carroll's case, 804; Greschia's case, 854.
28. If any *forcible* attempt is made with a felonious intent against person or property, the person resisting is not obliged to retreat, but may pursue his adversary, if necessary, until he finds himself out of danger. Pond's case, 814.

'RIOTS.

1. Duty of interfering in suppression of, and justification of homicide in such cases. 737, note; Pond's case, 814.

SELF-DEFENCE.

See DEFENCE; OCCASION PRODUCED BY SLAYER.

1. Is a defensive, not an offensive act, and must not exceed the bounds of mere defence and prevention. To justify such act, there must be at least an apparent *necessity* to ward off by force some bodily harm. Shippey's case, 137.
2. There are two kinds of self-defence; the one, which is *justified* and perfectly innocent and excusable; the other, which is in some measure blameable and *barely excusable*. Riley and Stewart's case, 160. See also Pond's case, 814; Selfridge's case, 16, note.
3. The law of self-defence in cases of mutual combat and of felonious assault, and the doctrine of retreating to the wall, expounded at length. Riley and Stewart's case, 160.
4. The rule of common law is, that a man may repel force by force in defence of his person, habitation or property, against one who manifestly endeavors, by violence or surprise, to commit a known felony, such as rape, robbery, arson, burglary, or the like; and in these cases he is not obliged to retreat, but may pursue his adversary until he has freed himself from all danger. Selfridge's case, 3, 4; Collins' case, 595, note; Young's case, 402, note; Note to Stoffer's case, 230 *et seq.*; Pond's case, 814; Patten's case, 826; Carroll's case, 804.
5. The right of self-defence is not derived from society, but is a right which every individual brings with him into society, and retains in society, except so far as the laws have curtailed it. Gray v. Coombs, 867; Riley and Stewart's case, 160. So of the right to defend one's property. *Ibid*; State v. Moore, 891. And see Isaac's case, 175; Holmes' case, 757.
6. Doubted whether an assault only, unless with deadly weapon, will excuse a homicide on the ground of self-defence. Selfridge's case, 23.

SELF-PRESERVATION BY DESTRUCTION OF INNOCENT PERSON.

1. Seamen have no right, even in cases of extreme peril to their own lives, to sacrifice the lives of passengers, for the sake of preserving their own. On the contrary, being common carriers, and so paid to protect and carry the passengers, the seamen, beyond the number necessary to navigate the boat, in no circumstances can claim exemption from the common lot of the passengers. Holmes' case, 757.

SERVANT.

1. May interfere to prevent mischief where known felony is attempted. Riley and Stewart's case, 161; Pond's case, 814.

SIZE AND STRENGTH, RELATIVE, OF THE PARTIES.

1. An element in determining whether homicide is excusable. State v. Wells, 143; Copeland's case, 41; Benham's case, 115; Drum's case, 186.
2. Although one person may make an assault upon another with a knife, but under such circumstances of incapacity from physical debility as to preclude any reasonable grounds for fearing death or serious bodily harm, the assailed will not be excused in killing the assailant. Hinton's case, 83.
3. Where a boy of sixteen shot and killed a full-grown man who had assailed him with an ox-gad, held that the jury should have been instructed to consider, among other circumstances, the physical capacity of the parties. Benham's case, 121.
4. Manslaughter for a person of superior strength, to kill his antagonist with a heavy club in combat. Wells' case, 151.
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2. Of Iowa, Revision of 1860, §§ 4442, 4443, have not changed the common law on the subject of lawful resistance. John Kennedy's case, 110, 111.
3. Of California, on justifiable homicide, set out, and Hurley's case, expounding it, examined. 244, 245, note.
4. Of New York, on justifiable homicide, expounded with respect to the doctrine of the right to act upon reasonable *appearances of danger*. Shorter's case, 260.

5. Of Mississippi, Minnesota and Kansas, on same subject. 268, note.
6. Of Wisconsin and Missouri, on same subject. 269, note.

THREATS.

I. GENERALLY.

1. Object of proving. Johnson's case, 416; Sloan's case, 516; Scoggins' case, 586; Monroe's case, 468; Howell's case, 469, note; Dukes' case, 573, note.
2. The true distinction in regard to the admissibility of evidence of threats, communicated and uncommunicated, stated. Keener's case, 554.
3. The remoteness or nearness of time as to threats and declarations pointing to acts subsequently committed, does not affect the competency of such testimony. Keener's case, 554, 555; Ford's case, 555, note. Contra, Jackson's case, 520, note; Sloan's case, 516; Hays' case, 492.
4. Threats and menaces of the parties to be considered by the jury in determining their situation at the time of the killing. Selbert's case, 686, note.

II. COMMUNICATED.

5. Contingent threat of son of assailant, communicated to defendant, admissible. Rapp's case, 293.
6. Evidence of, not admissible, unless there be testimony tending to show some demonstration indicating design to carry them out. Evans' case, 336, 337; Myers' case, 437; Hughey's case, 588, note. To the same effect, Mullen's case, 593, note; Leonard's case, 594, note.
7. Or where defendant invites deceased to mortal combat, and then kills him while in the act of preparation. Ibid.
8. In trials for homicide, evidence of threats made by the deceased against the accused, and communicated to the deceased before the killing, is admissible as tending to create a belief in the mind of the accused that his life was in danger, or that he had reason to apprehend some great bodily harm from the acts and motions of the deceased. Stokes' case, 927.
9. Admissible, without proof of overt act at time of killing. Pridgen's case, 416, LINDSAY, J., dissenting; Robert Jackson's case, 476. Contra, Myers' case, 437; Hays' case, 492.
10. Must be an actual threat; not an expression of opinion. Myers' case, 437.
11. Evidence of, inadmissible, where the record did not show ~~when~~ they were made, and where the prisoner sought the difficulty and killed the deceased under circumstances showing express malice. Hays' case, 492.
12. Otherwise if deceased had attacked defendant, or endeavored to advantage of him in a personal conflict, or had given him ground to suppose that he meant to do him some great bodily harm. *Id.*

13. Such threats must be *recent*, or continued down nearly to the time of the killing. *Ibid.*
14. If the record do not show *when* they were made, this is a sufficient ground for excluding them. *Ibid.*
15. But where there has been a long-continued series of threats, it is error to reject all threats made more than three days before the killing. Sloan's case, 516.
16. Admissible to show reasonableness of defendant's fears. Monroe's case, 442.
17. Competent to prove a continued series of communicated threats. *Ibid.*
18. Competent to prove threats, to show the *quo animo* of the defendant, and rebut the presumption of malice. Howell's case, 469, note.
19. The rule appears to be, that where the testimony proves a continued series of threats, extending back for several weeks or months, if such threats were communicated to the defendant, they will not be excluded as being too stale or remote. Sloan's case, 516.
20. If the threats were made shortly before the killing, and the deceased was armed to carry out such threats, they are admissible as part of the *res gestæ*. *Ibid.*
21. The doctrine of communicated threats confused with the doctrine of *cooling time*. Jackson's case, 520, note; and see Hawkins' case, 522, note.
22. Threats made the day before the killing and communicated, clearly admissible, where there is an uninterrupted chain of events extending from the time of the threats to that of the killing. Keene's case, 532.
23. Threats made a short time before the killing admissible. Dupree's case, 582.
24. Evidence of previous continued threats; that the defendant had escaped from an attempted assassination on the Saturday before the killing; that on the day before the killing the deceased had waylaid the defendant to shoot him, who had escaped by taking another road—were excluded because there was no act done at the time of the killing indicating an intention to kill the defendant or do him great bodily harm. Hughey's case, 589, note.
25. Such evidence not admissible where defendant "sought, pursued and killed the deceased." Leonard's case, 594, note.
26. Evidence of threats of death made shortly before the killing and on the same day, admissible in connection with a slight assault, to show the reasonableness of defendant's fears. Collins' case, 595, note.
27. Communicated threats admissible to show reasonable fears of death or great bodily harm. Scoggins' case, 596.
28. On a trial for murder, where it appeared that the deceased and two companions sought to gain admittance into a house of ill-fame by violence, and against the will of the keeper thereof, who ran out and struck the deceased with a door-bar, from which death ensued, it was held, that testimony that threats had been made a week before,

by a party of rioters, who had broken into the house and abused the inmates, that they would return some other night and break in again, might be received and submitted to the consideration of the jury, under the instruction of the Court; although it seems that for the rejection of such evidence, where it was not shown that the deceased was one of the party who made the threats, a new trial would not be granted. Rector's case, 796, BRONSON, J., dissenting.

29. Killing in defence against riotous attack upon habitation—evidence of a previous beating, and that the rioters then threatened that they would return and tear defendant's house down, admitted. Meade's case, 796.

III. UNCOMMUNICATED.

30. Where evidence has been given, making it a question for the jury whether the killing was excusable self-defence, evidence of threats made by the deceased against the accused a short time before the killing, but not communicated to the accused before the killing, is admissible. Stokes' case, 927; Campbell's case, 282; Little's case, 487; Goodrich's case, 532; Holler's case, 565; Keener's case, 531. Cornelius v. Commonwealth, 15 B. Monr., 539; Pitman's case, 574; Howell's case, in note to Monroe's case, 469; Riddle v. Brown, in note to Goodrich's case, 533; Scoggins' case, 596, and Arnold's case, in note to Scoggins' case, 600. Contra, Powell v. State, 587, note; Atkins v. State, 576, note; Lingo v. State, 556, note; Newcomb v. State, 613, note; People v. Henderson, 28 Cal., 465.
31. Evidence of mutinous combination among seamen, will not justify master in killing a seaman, unless it appears that he had knowledge of it. Wiltberger's case, 39.
32. Admissible for the purpose of showing the design with which the deceased went to the place of the encounter. Campbell's case, 282; Keener's case, 555. But in later cases in Georgia, such threats were excluded. Lingo's case, 556, note; Hays' case, Ibid.
33. Admissible; and if it appear that they did not come to the knowledge of the defendant, they will not be a justification. Howell's case, 469, note.
34. Admissible in all cases where the acts of the deceased with reference to the fatal meeting are of a doubtful character. Little's case, 487; Holler's case, 565.
35. Made shortly before the killing, the deceased being armed to carry them out, admissible as part of the *res gestæ*. Sloan's case, 516; Pitman's case, 574.
36. Admissible on indictment for assault to kill, for the purpose of showing the *intent* with which the prosecutor went to the defendant's house, and his *feelings* toward defendant. Goodrich's case, 533.
37. In civil action for assault and battery, admissible as tending to show which party was probably the aggressor. Murphy v. Dent, 538, note. The same point substantially in Riddle v. Brown, 538, note.

38. On a trial for homicide, where the evidence that the deceased had possession of a deadly weapon on the day preceding the fatal affray is contradictory. Holler's case, 565.
39. Admissible to corroborate evidence of communicated threats previously admitted. Holler's case, 569; Cornelius v. Commonwealth, 569, note.
40. Proof of threats made several days before the killing and not communicated, held not admissible in Atkin's case, 576, note; and see Coker's case, 578, note.
41. Evidence of, held properly ruled out, there being nothing in the record to raise the inference that the defendant knew of them. But the Court do not decide that cases may not occur in which such testimony should be admitted. Powell's case, 587, note.
42. Evidence of uncommunicated threats admissible as *facts*, tending to illustrate the question which was the first assailant. Scoggins' case, 596; Arnold's case, 600, note.
43. But it would be the duty of the Court to explain to the jury carefully, that the proof was admitted only as tending to corroborate whatever other evidence there was that the deceased was the assailant, and for no other purpose. Scoggins' case, 596.
44. Thus, where the evidence left it in doubt who made the assault, it was competent to show that shortly before the killing the deceased had armed himself with a pistol, and also to prove the declarations there made as to his intention to use it, although such declarations may not have been communicated to the defendant. Arnold's case, 600, note.
45. The doctrine of uncommunicated threats as presumptive evidence illustrated by Lyon v. Hancock, quoted, p. 609.
46. Uncommunicated threats not so recent as to constitute a part of the *res gestæ*, held properly excluded in Chambers v. Porter, 612-13, note. [But this case is overruled in the same State. Robert Jackson's case, 476, and Little's case, 487.]
47. Evidence of uncommunicated threats made six weeks or two months before the killing were excluded in a case where the killing was deliberate, and where there was no demonstration against the accused at the time of the killing, nor any ground for supposing himself in danger. Newcomb's case, 613, note.
48. Such evidence, in general, admissible only when so recent as to constitute a part of the *res gestæ*. Carroll's case, 804.
49. Where the deceased entered the prisoner's house after having been forbidden to do so, but the proof did not disclose that he offered or attempted any personal violence against the prisoner, it was held, that evidence of such uncommunicated threats was not admissible to show the character of the conduct of the deceased in entering the house, after he had been warned not to do so. *Ibid.*

IV. EFFECT OF.

50. Do not justify an assault, much less the taking of life. Evans' case, 335, 336; Lander's case, 366; Johnson's case, 413.

51. Afford no excuse for homicide, unless at the time of the killing an effort was apparently being made to carry them into execution. Head's case, 341; Rippy's case, 345; Williams' case, 349; Lander's case, 366; Johnson's case, 413; Pasch. Dig. Tex. Stat., Art. 2270; Robert Jackson's case, 476.
52. No extenuation of a homicide committed by lying in wait with a deadly weapon. Lander's case, 366.
53. Do not, under the Texas statute, reduce a homicide to manslaughter. Johnson's case, 413; Wall's case, 614-15.
54. No extenuation of a homicide committed with a deadly weapon upon a person who is unarmed. Coker's case, 579, note.
55. Made *by defendant*, admitted to show malice. Scoggins' case, 596.

TRESPASSERS, EXPULSION OF.

From Habitation, see HABITATION. From other Property, see PROPERTY, DEFENCE OF.

1. Deliberate killing of another to prevent a mere trespass upon property, is murder. Harrison's case, 71, 75; Drew's case, 705; and see John Kennedy's case, 111.
2. It is lawful for a person to exert as much force as is necessary to put a trespasser out of the house in which the former lawfully is. Robertson's case, 152.
3. No man can defend his property (other than his dwelling) by making use of a deadly weapon. Zeller's case, 472; Drew's case, 705.

WAR.

1. Right of self-defence as applied to a state of private or mixed war. McLeod's case, 784.

WHARTON, DR.

1. His criticism of Selfridge's case examined. Note, 28.

WITNESSES.

1. All present at the transaction to be called by the prosecuting officer. Hurd's case, 840; and see Barfield's case, 624, note.

WRONG-DOER.

Defence by; see OCCASION PRODUCED BY SLAYER.

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30. Where evidence has been given, making it a question for the jury whether the killing was excusable self-defence, evidence of threats made by the deceased against the accused a short time before the killing, but not communicated to the accused before the killing, is admissible. Stokes' case, 927; Campbell's case, 282; Little's case, 487; Goodrich's case, 532; Holler's case, 565; Keener's case, 531; *Cornellius v. Commonwealth*, 15 B. Monr., 539; Pitman's case, 574; Howell's case, in note to Monroe's case, 469; Riddle v. Brown, in note to Goodrich's case, 538; Scoggins' case, 596, and Arnold's case, in note to Scoggins' case, 600. Contra, *Powell v. State*, 587, note; *Atkins v. State*, 576, note; *Lingo v. State*, 556, note; *Newcomb v. State*, 613, note; *People v. Henderson*, 28 Cal., 465.
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35. Made shortly before the killing, the deceased being armed to carry them out, admissible as part of the *res gestæ*. Sloan's case, 516; Pitman's case, 574.
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1. Right of self-defence as applied to a state of private or mixed war. McLeod's case, 784.

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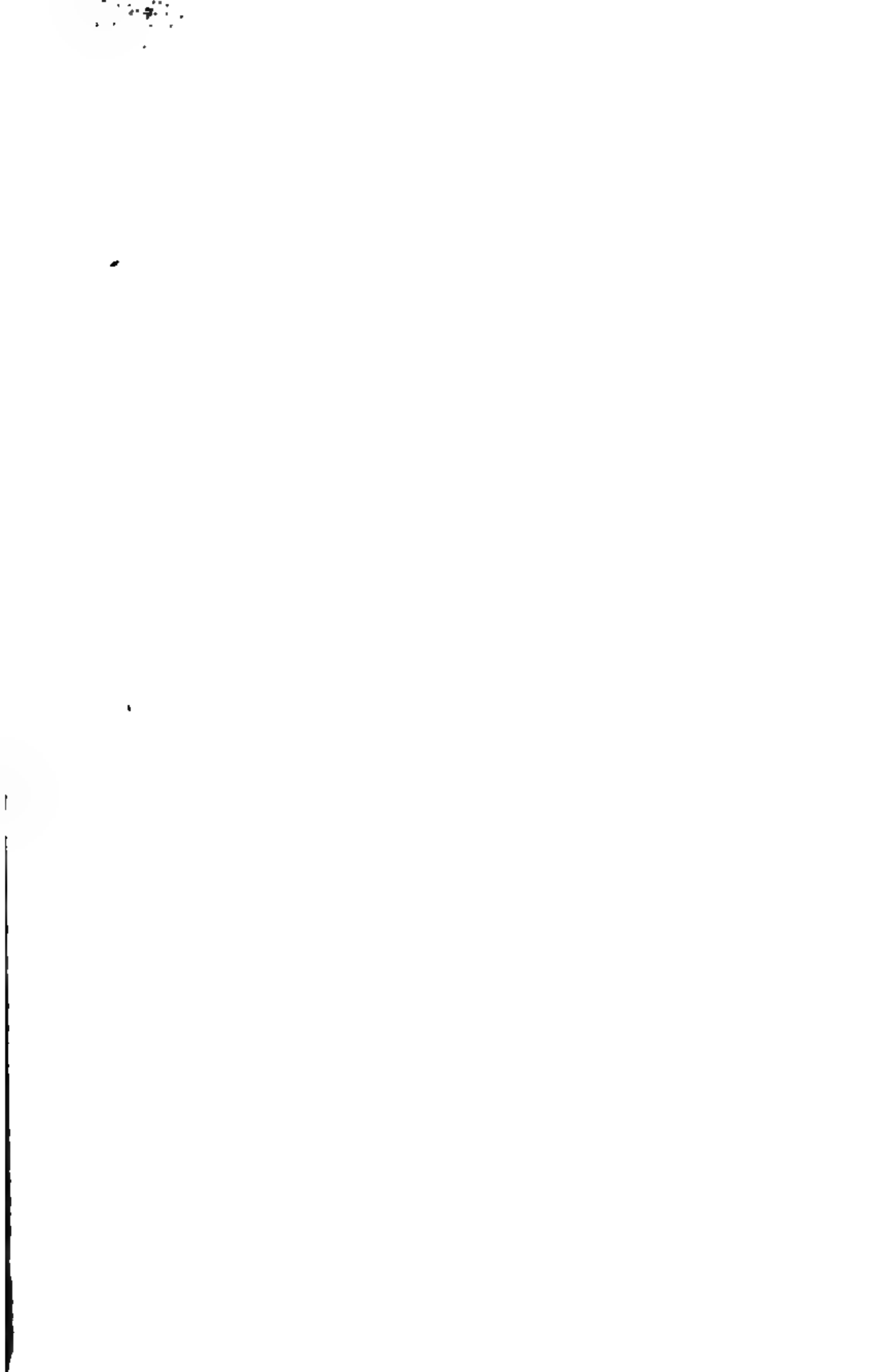
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13. Such threats must be *recent*, or continued down nearly to the time of the killing. *Ibid.*
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16. Admissible to show reasonableness of defendant's fears. Monroe's case, 442.
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18. Competent to prove threats, to show the *quo animo* of the defendant, and rebut the presumption of malice. Howell's case, 469, note.
19. The rule appears to be, that where the testimony proves a continued series of threats, extending back for several weeks or months, if such threats were communicated to the defendant, they will not be excluded as being too stale or remote. Sloan's case, 516.
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21. The doctrine of communicated threats confused with the doctrine of *cooling time*. Jackson's case, 520, note; and see Hawkins' case, 522, note.
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by a party of rioters, who had broken into the house and abused the inmates, that they would return some other night and break in again, might be received and submitted to the consideration of the jury, under the instruction of the Court; although *it seems* that for the rejection of such evidence, where it was not shown that the deceased was one of the party who made the threats, a new trial would not be granted. Rector's case, 796, BRONSON, J., dissenting.

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SELF-PRESERVATION BY DESTRUCTION OF INNOCENT PERSON.

1. Seamen have no right, even in cases of extreme peril to their own lives, to sacrifice the lives of passengers, for the sake of preserving their own. On the contrary, being common carriers, and so paid to protect and carry the passengers, the seamen, beyond the number necessary to navigate the boat, in no circumstances can claim exemption from the common lot of the passengers. Holmes' case, 757.

SERVANT.

1. May interfere to prevent mischief where known felony is attempted. Riley and Stewart's case, 161; Pond's case, 814.

SIZE AND STRENGTH, RELATIVE, OF THE PARTIES.

1. An element in determining whether homicide is excusable. State v. Wells, 143; Copeland's case, 41; Benham's case, 115; Drum's case, 186.
2. Although one person may make an assault upon another with a knife, but under such circumstances of incapacity from physical debility as to preclude any reasonable grounds for fearing death or serious bodily harm, the assailed will not be excused in killing the assailant. Hinton's case, 83.
3. Where a boy of sixteen shot and killed a full-grown man who had assailed him with an ox-gad, held that the jury should have been instructed to consider, among other circumstances, the physical capacity of the parties. Benham's case, 121.
4. Manslaughter for a person of superior strength, to kill his antagonist with a heavy club in combat. Wells' case, 151.
5. Evidence to show the great muscular strength and vigor of deceased excluded in a case in Massachusetts, where the killing was in combat. Mead's case, 679, note; and see 696, note, where this case is criticised by the editors.

STATUTES.

1. Of Arkansas, California, Colorado, Illinois and Dakota on justifiable and excusable homicide cited. Selfridge's case, 16, note.
2. Of Iowa, Revision of 1860, §§ 4442, 4443, have not changed the common law on the subject of lawful resistance. John Kennedy's case, 110, 111.
3. Of California, on justifiable homicide, set out, and Hurley's case, expounding it, examined. 244, 245, note.
4. Of New York, on justifiable homicide, expounded with respect to the doctrine of the right to act upon reasonable *appearances of danger*. Shorter's case, 260.

5. Of Mississippi, Minnesota and Kansas, on same subject. 268, note.
6. Of Wisconsin and Missouri, on same subject. 269, note.

THREATS.

I. GENERALLY.

1. Object of proving. Johnson's case, 416; Sloan's case, 516; Scoggins' case, 596; Monroe's case, 468; Howell's case, 469, note; Dukes' case, 573, note.
2. The true distinction in regard to the admissibility of evidence of threats, communicated and uncommunicated, stated. Keener's case, 554.
3. The *remoteness* or *nearness* of time as to threats and declarations pointing to acts subsequently committed, does not affect the competency of such testimony. Keener's case, 554, 555; Ford's case, 555, note. Contra, Jackson's case, 520, note; Sloan's case, 516; Hays' case, 492.
4. Threats and menaces of the parties to be considered by the jury in determining their situation at the time of the killing. Selbert's case, 686, note.

II. COMMUNICATED.

5. Contingent threat of son of assailant, communicated to defendant, admissible. Rapp's case, 293.
6. Evidence of, not admissible, unless there be testimony tending to show some demonstration indicating design to carry them out. Evans' case, 336, 337; Myers' case, 437; Hughey's case, 589, note. To the same effect, Mullen's case, 593, note; Leonard's case, 594, note.
7. Or where defendant invites deceased to mortal combat, and then kills him while in the act of preparation. Ibid.
8. In trials for homicide, evidence of threats made by the deceased against the accused, and communicated to the deceased before the killing, is admissible as tending to create a belief in the mind of the accused that his life was in danger, or that he had reason to apprehend some great bodily harm from the acts and motions of the deceased. Stokes' case, 927.
9. Admissible, without proof of overt act at time of killing. Pridgen's case, 416, LINDSAY, J., dissenting; Robert Jackson's case, 476. Contra, Myers' case, 437; Hays' case, 492.
10. Must be an actual threat; not an expression of opinion. Myers' case, 437.
11. Evidence of, inadmissible, where the record did not show *when* they were made, and where the prisoner sought the difficulty and killed the deceased under circumstances showing express malice. Hays' case, 492.
12. Otherwise if deceased had attacked defendant, or endeavored to get advantage of him in a personal conflict, or had given him ground to suppose that he meant to do him some great bodily harm. Ibid.

13. Such threats must be *recent*, or continued down nearly to the time of the killing. *Ibid.*
14. If the record do not show *when* they were made, this is a sufficient ground for excluding them. *Ibid.*
15. But where there has been a long-continued series of threats, it is error to reject all threats made more than three days before the killing. Sloan's case, 516.
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by a party of rioters, who had broken into the house and abused the inmates, that they would return some other night and break in again, might be received and submitted to the consideration of the jury, under the instruction of the Court; although *it seems* that for the rejection of such evidence, where it was not shown that the deceased was one of the party who made the threats, a new trial would not be granted. Rector's case, 796, BRONSON, J., dissenting.

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III. UNCOMMUNICATED.

30. Where evidence has been given, making it a question for the jury whether the killing was excusable self-defence, evidence of threats made by the deceased against the accused a short time before the killing, but not communicated to the accused before the killing, is admissible. Stokes' case, 927; Campbell's case, 282; Little's case, 487; Goodrich's case, 532; Holler's case, 565; Keener's case, 531; Cornelius v. Commonwealth, 15 B. Monr., 539; Pitman's case, 574; Howell's case, in note to Monroe's case, 469; Riddle v. Brown, in note to Goodrich's case, 538; Scoggins' case, 596, and Arnold's case, in note to Scoggins' case, 600. Contra, Powell v. State, 587, note; Atkins v. State, 576, note; Lingo v. State, 556, note; Newcomb v. State, 613, note; People v. Henderson, 28 Cal., 465.
31. Evidence of mutinous combination among seamen, will not justify master in killing a seaman, unless it appears that he had knowledge of it. Wiltberger's case, 39.
32. Admissible for the purpose of showing the design with which the deceased went to the place of the encounter. Campbell's case, 282; Keener's case, 555. But in later cases in Georgia, such threats were excluded. Lingo's case, 556, note; Hays' case, Ibid.
33. Admissible; and if it appear that they did not come to the knowledge of the defendant, they will not be a justification. Howell's case, 469, note.
34. Admissible in all cases where the acts of the deceased with reference to the fatal meeting are of a doubtful character. Little's case, 487; Holler's case, 565.
35. Made shortly before the killing, the deceased being armed to carry them out, admissible as part of the *res gestæ*. Sloan's case, 516; Pitman's case, 574.
36. Admissible on indictment for assault to kill, for the purpose of showing the *intent* with which the prosecutor went to the defendant's house, and his *feelings* toward defendant. Goodrich's case, 533.
37. In civil action for assault and battery, admissible as tending to show which party was probably the aggressor. Murphy v. Dent, 538, note. The same point substantially in Riddle v. Brown, 538, note.

13. Such threats must be *recent*, or continued down nearly to the time of the killing. Ibid.
14. If the record do not show *when* they were made, this is a sufficient ground for excluding them. Ibid.
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16. Admissible to show reasonableness of defendant's fears. Monroe's case, 442.
17. Competent to prove a continued series of communicated threats. Ibid.
18. Competent to prove threats, to show the *quo animo* of the defendant, and rebut the presumption of malice. Howell's case, 469, note.
19. The rule appears to be, that where the testimony proves a continued series of threats, extending back for several weeks or months, if such threats were communicated to the defendant, they will not be excluded as being too stale or remote. Sloan's case, 516.
20. If the threats were made shortly before the killing, and the deceased was armed to carry out such threats, they are admissible as part of the *res gestæ*. Ibid.
21. The doctrine of communicated threats confused with the doctrine of *cooling time*. Jackson's case, 520, note; and see Hawkins' case, 522, note.
22. Threats made the day before the killing and communicated, clearly admissible, where there is an uninterrupted chain of events extending from the time of the threats to that of the killing. Keene's case, 532.
23. Threats made a short time before the killing admissible. Dupree's case, 582.
24. Evidence of previous continued threats; that the defendant had escaped from an attempted assassination on the Saturday before the killing; that on the day before the killing the deceased had waylaid the defendant to shoot him, who had escaped by taking another road—were excluded because there was no act done at the time of the killing indicating an intention to kill the defendant or do him great bodily harm. Hughey's case, 589, note.
25. Such evidence not admissible where defendant "sought, pursued and killed the deceased." Leonard's case, 594, note.
26. Evidence of threats of death made shortly before the killing and on the same day, admissible in connection with a slight assault, to show the reasonableness of defendant's fears. Collins' case, 595, note.
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38. On a trial for homicide, where the evidence that the deceased had possession of a deadly weapon on the day preceding the fatal affray is contradictory. Holler's case, 565.
39. Admissible to corroborate evidence of communicated threats previously admitted. Holler's case, 569; Cornelius v. Commonwealth, 569, note.
40. Proof of threats made several days before the killing and not communicated, held not admissible in Atkin's case, 576, note; and see Coker's case, 578, note.
41. Evidence of, held properly ruled out, there being nothing in the record to raise the inference that the defendant knew of them. But the Court do not decide that cases may not occur in which such testimony should be admitted. Powell's case, 587, note.
42. Evidence of uncommunicated threats admissible as *facts*, tending to illustrate the question which was the first assailant. Scoggins' case, 596; Arnold's case, 600, note.
43. But it would be the duty of the Court to explain to the jury carefully, that the proof was admitted only as tending to corroborate whatever other evidence there was that the deceased was the assailant, and for no other purpose. Scoggins' case, 596.
44. Thus, where the evidence left it in doubt who made the assault, it was competent to show that shortly before the killing the deceased had armed himself with a pistol, and also to prove the declarations there made as to his intention to use it, although such declarations may not have been communicated to the defendant. Arnold's case, 600, note.
45. The doctrine of uncommunicated threats as presumptive evidence illustrated by Lyon v. Hancock, quoted, p. 609.
46. Uncommunicated threats not so recent as to constitute a part of the *res gestæ*, held properly excluded in Chambers v. Porter, 612-13, note. [But this case is overruled in the same State. Robert Jackson's case, 476, and Little's case, 487.]
47. Evidence of uncommunicated threats made six weeks or two months before the killing were excluded in a case where the killing was deliberate, and where there was no demonstration against the accused at the time of the killing, nor any ground for supposing himself in danger. Newcomb's case, 613, note.
48. Such evidence, in general, admissible only when so recent as to constitute a part of the *res gestæ*. Carroll's case, 804.
49. Where the deceased entered the prisoner's house after having been forbidden to do so, but the proof did not disclose that he offered or attempted any personal violence against the prisoner, it was held, that evidence of such uncommunicated threats was not admissible to show the character of the conduct of the deceased in entering the house, after he had been warned not to do so. *Ibid.*

IV. EFFECT OF.

50. Do not justify an assault, much less the taking of life. Evans' case, 335, 336; Lander's case, 366; Johnson's case, 413.

51. Afford no excuse for homicide, unless at the time of the killing an effort was apparently being made to carry them into execution. Head's case, 341; Rippy's case, 345; Williams' case, 349; Lander's case, 366; Johnson's case, 413; Pasch. Dig. Tex. Stat., Art. 2270; Robert Jackson's case, 476.
52. No extenuation of a homicide committed by lying in wait with a deadly weapon. Lander's case, 366.
53. Do not, under the Texas statute, reduce a homicide to manslaughter. Johnson's case, 413; Wall's case, 614-15.
54. No extenuation of a homicide committed with a deadly weapon upon a person who is unarmed. Coker's case, 579, note.
55. Made *by defendant*, admitted to show malice. Scoggins' case, 596.

TRESPASSERS, EXPULSION OF.

From Habitation, see HABITATION. From other Property, see PROPERTY, DEFENCE OF.

1. Deliberate killing of another to prevent a mere trespass upon property, is murder. Harrison's case, 71, 75; Drew's case, 705; and see John Kennedy's case, 111.
2. It is lawful for a person to exert as much force as is necessary to put a trespasser out of the house in which the former lawfully is. Robertson's case, 152.
3. No man can defend his property (other than his dwelling) by making use of a deadly weapon. Zeller's case, 472; Drew's case, 705.

WAR.

1. Right of self-defence as applied to a state of private or mixed war. McLeod's case, 784.

WHARTON, DR.

1. His criticism of Selfridge's case examined. Note, 23.

WITNESSES.

1. All present at the transaction to be called by the prosecuting officer. Hurd's case, 840; and see Barfield's case, 624, note.

WRONG-DOER.

Defence by; see OCCASION PRODUCED BY SLAYER.

SELF-PRESERVATION BY DESTRUCTION OF INNOCENT PERSON.

1. Seamen have no right, even in cases of extreme peril to their own lives, to sacrifice the lives of passengers, for the sake of preserving their own. On the contrary, being common carriers, and so paid to protect and carry the passengers, the seamen, beyond the number necessary to navigate the boat, in no circumstances can claim exemption from the common lot of the passengers. Holmes' case, 757.

SERVANT.

1. May interfere to prevent mischief where known felony is attempted. Riley and Stewart's case, 161; Pond's case, 814.

SIZE AND STRENGTH, RELATIVE, OF THE PARTIES.

1. An element in determining whether homicide is excusable. State v. Wells, 143; Copeland's case, 41; Benham's case, 115; Drum's case, 186.
2. Although one person may make an assault upon another with a knife, but under such circumstances of incapacity from physical debility as to preclude any reasonable grounds for fearing death or serious bodily harm, the assailed will not be excused in killing the assailant. Hinton's case, 83.
3. Where a boy of sixteen shot and killed a full-grown man who had assailed him with an ox-goad, held that the jury should have been instructed to consider, among other circumstances, the physical capacity of the parties. Benham's case, 121.
4. Manslaughter for a person of superior strength, to kill his antagonist with a heavy club in combat. Wells' case, 151.
5. Evidence to show the great muscular strength and vigor of deceased excluded in a case in Massachusetts, where the killing was in combat. Mead's case, 679, note; and see 696, note, where this case is criticised by the editors.

STATUTES.

1. Of Arkansas, California, Colorado, Illinois and Dakota on justifiable and excusable homicide cited. Selfridge's case, 16, note.
2. Of Iowa, Revision of 1860, §§ 4442, 4443, have not changed the common law on the subject of lawful resistance. John Kennedy's case, 110, 111.
3. Of California, on justifiable homicide, set out, and Hurley's case, expounding it, examined. 244, 245, note.
4. Of New York, on justifiable homicide, expounded with respect to the doctrine of the right to act upon reasonable *appearances of danger*. Shorter's case, 260.

5. Of Mississippi, Minnesota and Kansas, on same subject. 268, note.
6. Of Wisconsin and Missouri, on same subject. 269, note.

THREATS.

I. GENERALLY.

1. Object of proving. Johnson's case, 416; Sloan's case, 516; Scoggins' case, 596; Monroe's case, 468; Howell's case, 469, note; Dukes' case, 573, note.
2. The true distinction in regard to the admissibility of evidence of threats, communicated and uncommunicated, stated. Keener's case, 554.
3. The *remoteness* or *nearness* of time as to threats and declarations pointing to acts subsequently committed, does not affect the competency of such testimony. Keener's case, 554, 555; Ford's case, 555, note. Contra, Jackson's case, 520, note; Sloan's case, 516; Hays' case, 492.
4. Threats and menaces of the parties to be considered by the jury in determining their situation at the time of the killing. Seibert's case, 686, note.

II. COMMUNICATED.

5. Contingent threat of son of assailant, communicated to defendant, admissible. Rapp's case, 293.
6. Evidence of, not admissible, unless there be testimony tending to show some demonstration indicating design to carry them out. Evans' case, 336, 337; Myers' case, 437; Hughey's case, 589, note. To the same effect, Mullen's case, 593, note; Leonard's case, 594, note.
7. Or where defendant invites deceased to mortal combat, and then kills him while in the act of preparation. Ibid.
8. In trials for homicide, evidence of threats made by the deceased against the accused, and communicated to the deceased before the killing, is admissible as tending to create a belief in the mind of the accused that his life was in danger, or that he had reason to apprehend some great bodily harm from the acts and motions of the deceased. Stokes' case, 927.
9. Admissible, without proof of overt act at time of killing. Pridgen's case, 416, LINDSAY, J., dissenting; Robert Jackson's case, 476. Contra, Myers' case, 437; Hays' case, 492.
10. Must be an actual threat; not an expression of opinion. Myers' case, 437.
11. Evidence of, inadmissible, where the record did not show *when* they were made, and where the prisoner sought the difficulty and killed the deceased under circumstances showing express malice. Hays' case, 492.
12. Otherwise if deceased had attacked defendant, or endeavored to get advantage of him in a personal conflict, or had given him ground to suppose that he meant to do him some great bodily harm. Ibid.

13. Such threats must be *recent*, or continued down nearly to the time of the killing. *Ibid.*
14. If the record do not show ~~when~~ they were made, this is a sufficient ground for excluding them. *Ibid.*
15. But where there has been a long-continued series of threats, it is error to reject all threats made more than three days before the killing. Sloan's case, 516.
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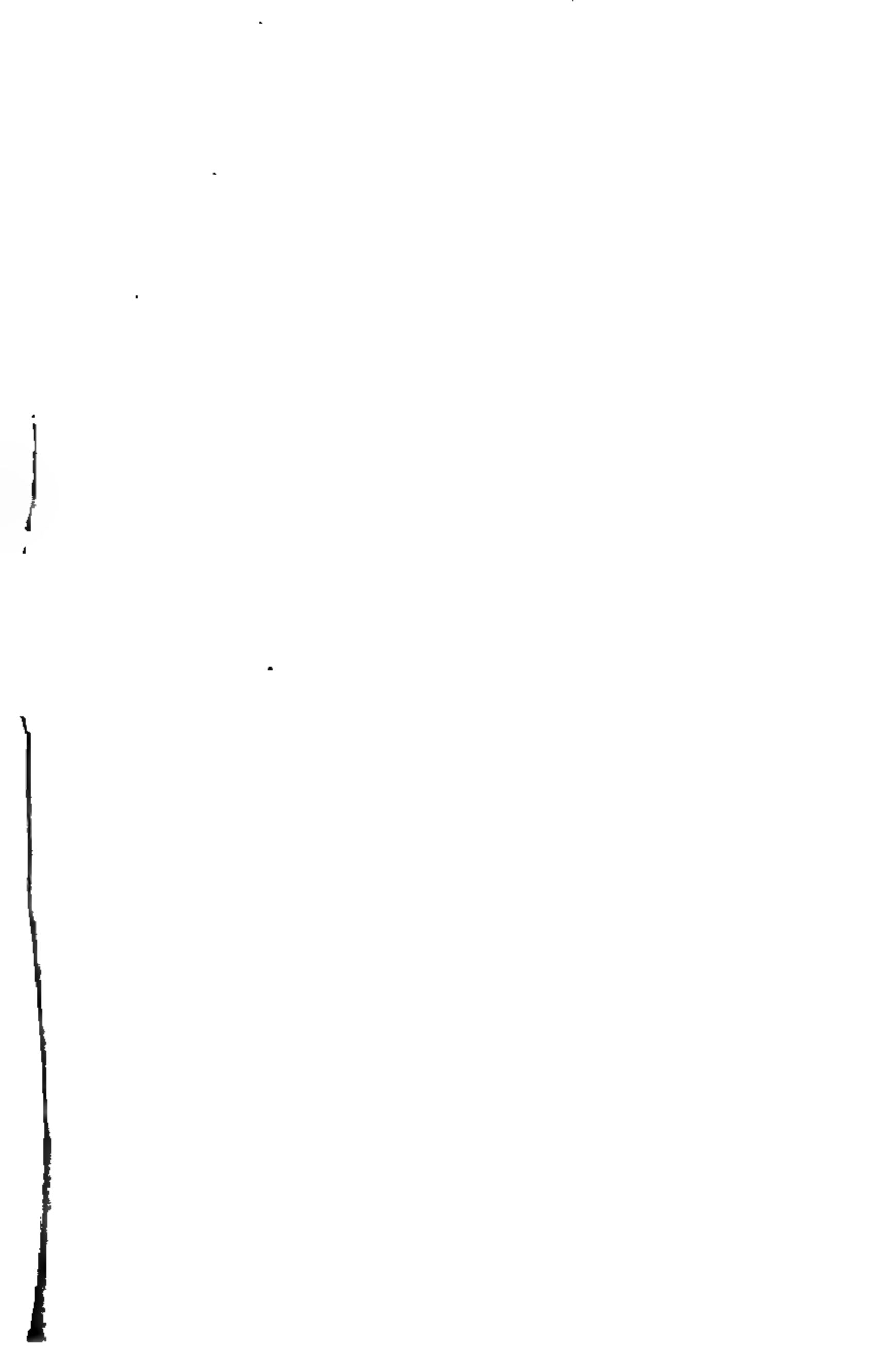
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6. Evidence of, not admissible, unless there be testimony tending to show some demonstration indicating design to carry them out. Evans' case, 336, 337; Myers' case, 437; Hughey's case, 589, note. To the same effect, Mullen's case, 593, note; Leonard's case, 594, note.
7. Or where defendant invites deceased to mortal combat, and then kills him while in the act of preparation. *Ibid.*
8. In trials for homicide, evidence of threats made by the deceased against the accused, and communicated to the deceased before the killing, is admissible as tending to create a belief in the mind of the accused that his life was in danger, or that he had reason to apprehend some great bodily harm from the acts and motions of the deceased. Stokes' case, 927.
9. Admissible, without proof of overt act at time of killing. Pridgen's case, 416, LINDSAY, J., dissenting; Robert Jackson's case, 476. Contra, Myers' case, 437; Hays' case, 492.
10. Must be an actual threat; not an expression of opinion. Myers' case, 437.
11. Evidence of, inadmissible, where the record did not show *when* they were made, and where the prisoner sought the difficulty and killed the deceased under circumstances showing express malice. Hays' case, 492.
12. Otherwise if deceased had attacked defendant, or endeavored to get advantage of him in a personal conflict, or had given him ground to suppose that he meant to do him some great bodily harm. *Ibid.*

13. Such threats must be *recent*, or continued down nearly to the time of the killing. *Ibid.*
14. If the record do not show *when* they were made, this is a sufficient ground for excluding them. *Ibid.*
15. But where there has been a long-continued series of threats, it is error to reject all threats made more than three days before the killing. Sloan's case, 516.
16. Admissible to show reasonableness of defendant's fears. Monroe's case, 442.
17. Competent to prove a continued series of communicated threats. *Ibid.*
18. Competent to prove threats, to show the *quo animo* of the defendant, and rebut the presumption of malice. Howell's case, 469, note.
19. The rule appears to be, that where the testimony proves a continued series of threats, extending back for several weeks or months, if such threats were communicated to the defendant, they will not be excluded as being too stale or remote. Sloan's case, 516.
20. If the threats were made shortly before the killing, and the deceased was armed to carry out such threats, they are admissible as part of the *res gestæ*. *Ibid.*
21. The doctrine of communicated threats confused with the doctrine of *cooling time*. Jackson's case, 520, note; and see Hawkins' case, 522, note.
22. Threats made the day before the killing and communicated, clearly admissible, where there is an uninterrupted chain of events extending from the time of the threats to that of the killing. Keene's case, 532.
23. Threats made a short time before the killing admissible. Dupree's case, 582.
24. Evidence of previous continued threats; that the defendant had escaped from an attempted assassination on the Saturday before the killing; that on the day before the killing the deceased had waylaid the defendant to shoot him, who had escaped by taking another road—were excluded because there was no act done at the time of the killing indicating an intention to kill the defendant or do him great bodily harm. Hughey's case, 589, note.
25. Such evidence not admissible where defendant "sought, pursued and killed the deceased." Leonard's case, 594, note.
26. Evidence of threats of death made shortly before the killing and on the same day, admissible in connection with a slight assault, to show the reasonableness of defendant's fears. Collins' case, 595, note.
27. Communicated threats admissible to show reasonable fears of death or great bodily harm. Scoggins' case, 596.
28. On a trial for murder, where it appeared that the deceased and two companions sought to gain admittance into a house of ill-fame by violence, and against the will of the keeper thereof, who ran out and struck the deceased with a door-bar, from which death ensued, it *was held*, that testimony that threats had been made a week before,

by a party of rioters, who had broken into the house and abused the inmates, that they would return some other night and break in again, might be received and submitted to the consideration of the jury, under the instruction of the Court; although *it seems* that for the rejection of such evidence, where it was not shown that the deceased was one of the party who made the threats, a new trial would not be granted. Rector's case, 796, BRONSON, J., dissenting.

29. Killing in defence against riotous attack upon habitation—evidence of a previous beating, and that the rioters then threatened that they would return and tear defendant's house down, admitted. Meade's case, 798.

III. UNCOMMUNICATED.

30. Where evidence has been given, making it a question for the jury whether the killing was excusable self-defence, evidence of threats made by the deceased against the accused a short time before the killing, but not communicated to the accused before the killing, is admissible. Stokes' case, 927; Campbell's case, 282; Little's case, 487; Goodrich's case, 532; Holler's case, 565; Keener's case, 531; *Cornelius v. Commonwealth*, 15 B. Monr., 539; Pitman's case, 574; Howell's case, in note to Monroe's case, 469; Riddle v. Brown, in note to Goodrich's case, 538; Scoggins' case, 596, and Arnold's case, in note to Scoggins' case, 600. Contra, Powell v. State, 587, note; Atkins v. State, 576, note; Lingo v. State, 556, note; Newcomb v. State, 613, note; People v. Henderson, 28 Cal., 465.
31. Evidence of mutinous combination among seamen, will not justify master in killing a seaman, unless it appears that he had knowledge of it. Wiltberger's case, 39.
32. Admissible for the purpose of showing the design with which the deceased went to the place of the encounter. Campbell's case, 282; Keener's case, 555. But in later cases in Georgia, such threats were excluded. Lingo's case, 556, note; Hays' case, *Ibid*.
33. Admissible; and if it appear that they did not come to the knowledge of the defendant, they will not be a justification. Howell's case, 469, note.
34. Admissible in all cases where the acts of the deceased with reference to the fatal meeting are of a doubtful character. Little's case, 487; Holler's case, 565.
35. Made shortly before the killing, the deceased being armed to carry them out, admissible as part of the *res gestæ*. Sloan's case, 516; Pitman's case, 574.
36. Admissible on indictment for assault to kill, for the purpose of showing the *intent* with which the prosecutor went to the defendant's house, and his *feelings* toward defendant. Goodrich's case, 533.
37. In civil action for assault and battery, admissible as tending to show which party was probably the aggressor. Murphy v. Dent, 538, note. The same point substantially in Riddle v. Brown, 538, note.

38. On a trial for homicide, where the evidence that the deceased had possession of a deadly weapon on the day preceding the fatal affray is contradictory. Holler's case, 565.
39. Admissible to corroborate evidence of communicated threats previously admitted. Holler's case, 569; *Cornellius v. Commonwealth*, 569, note.
40. Proof of threats made several days before the killing and not communicated, held not admissible in *Atkin's case*, 576, note; and see *Coker's case*, 578, note.
41. Evidence of, held properly ruled out, there being nothing in the record to raise the inference that the defendant knew of them. But the Court do not decide that cases may not occur in which such testimony should be admitted. *Powell's case*, 587, note.
42. Evidence of uncommunicated threats admissible as *facts*, tending to illustrate the question which was the first assailant. *Scoggins' case*, 596; *Arnold's case*, 600, note.
43. But it would be the duty of the Court to explain to the jury carefully, that the proof was admitted only as tending to corroborate whatever other evidence there was that the deceased was the assailant, and for no other purpose. *Scoggins' case*, 596.
44. Thus, where the evidence left it in doubt who made the assault, it was competent to show that shortly before the killing the deceased had armed himself with a pistol, and also to prove the declarations there made as to his intention to use it, although such declarations may not have been communicated to the defendant. *Arnold's case*, 600, note.
45. The doctrine of uncommunicated threats as presumptive evidence illustrated by *Lyon v. Hancock*, quoted, p. 609.
46. Uncommunicated threats not so recent as to constitute a part of the *res gestæ*, held properly excluded in *Chambers v. Porter*, 612-13, note. [But this case is overruled in the same State. *Robert Jackson's case*, 476, and *Little's case*, 487.]
47. Evidence of uncommunicated threats made six weeks or two months before the killing were excluded in a case where the killing was deliberate, and where there was no demonstration against the accused at the time of the killing, nor any ground for supposing himself in danger. *Newcomb's case*, 613, note.
48. Such evidence, in general, admissible only when so recent as to constitute a part of the *res gestæ*. *Carroll's case*, 804.
49. Where the deceased entered the prisoner's house after having been forbidden to do so, but the proof did not disclose that he offered or attempted any personal violence against the prisoner, it was held, that evidence of such uncommunicated threats was not admissible to show the character of the conduct of the deceased in entering the house, after he had been warned not to do so. *Ibid.*

IV. EFFECT OF.

50. Do not justify an assault, much less the taking of life. *Evans' case*, 335, 336; *Lander's case*, 366; *Johnson's case*, 413.

51. Afford no excuse for homicide, unless at the time of the killing an effort was apparently being made to carry them into execution. Head's case, 341; Rippy's case, 345; Williams' case, 349; Lander's case, 366; Johnson's case, 413; Pasch. Dig. Tex. Stat., Art. 2270; Robert Jackson's case, 476.
52. No extenuation of a homicide committed by lying in wait with a deadly weapon. Lander's case, 366.
53. Do not, under the Texas statute, reduce a homicide to manslaughter. Johnson's case, 413; Wall's case, 614-15.
54. No extenuation of a homicide committed with a deadly weapon upon a person who is unarmed. Coker's case, 579, note.
55. Made *by defendant*, admitted to show malice. Scoggins' case, 596.

TRESPASSERS, EXPULSION OF.

From Habitation, see HABITATION. From other Property, see PROPERTY, DEFENCE OF.

1. Deliberate killing of another to prevent a mere trespass upon property, is murder. Harrison's case, 71, 75; Drew's case, 705; and see John Kennedy's case, 111.
2. It is lawful for a person to exert as much force as is necessary to put a trespasser out of the house in which the former lawfully is. Robertson's case, 152.
3. No man can defend his property (other than his dwelling) by making use of a deadly weapon. Zeller's case, 472; Drew's case, 705.

WAR.

1. Right of self-defence as applied to a state of private or mixed war. McLeod's case, 784.

WHARTON, DR.

1. His criticism of Selfridge's case examined. Note, 28.

WITNESSES.

1. All present at the transaction to be called by the prosecuting officer. Hurd's case, 840; and see Barfield's case, 624, note.

WRONG-DOER.

Defence by; see OCCASION PRODUCED BY SLAYER.

